Supreme Court, U.S.
FILED
07-20 JUL 2 - 2007
OFFICE OF THE CLERK

No. 06-___

IN THE

Supreme Court of the United States

BARR LABORATORIES, INC.,
Petitioner,

v.

MEERA SAMANTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JOSEPH P. THOMAS *
LINDA E. MAICHL
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
(513) 698-5000

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Does the standard for fraudulent joinder include a consideration of the plaintiff's "good faith" intent to pursue the action against a non-diverse defendant, or is it merely a question of whether the plaintiff has stated a viable claim in her complaint against the non-diverse defendant. If consideration of "good faith" intent is included in the standard for fraudulent joinder, must the court look beyond the pleadings to make that determination.

Where the defendant makes out a prima facie case of "bad faith" or lack of intent to prosecute in the removal petition, does the burden of proof shift to the plaintiff to show a lack of "bad faith" or a good faith intent to prosecute the claims asserted against the non-diverse defendant.

Does this Court's decision in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), mandate a finding that the defendant has satisfied its burden of proving fraudulent joinder where the plaintiff fails to take issue with or object to any allegations made in the removal petition or supporting documentation.

Does this Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), and earlier U.S. Supreme Court decisions, mandate judgment be affirmed where the non-diverse defendant remains unserved at the time of judgment.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all the parties to the appellate proceeding in the Ninth Circuit Court of Appeals, whose judgment is sought to be reviewed:

A. Petitioner

Barr Laboratories, Inc.

B. Respondent

Meera Samanta

CORPORATE DISCLOSURE STATEMENT

Petitioner Barr Laboratories, Inc., is the wholly-owned subsidiary of Barr Pharmaceuticals, Inc. Barr Pharmaceuticals, Inc., is a publicly traded stock company. No publicly held company owns 10% or more of Barr Pharmaceuticals, Inc.'s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
A. Certiorari Should Be Granted To Clarify Existing Ambiguity Regarding the Law Related to Removal of Actions from State to Federal Court	2
B. The Ninth Circuit's Decision, Based on the Facts of this Case, Is Wholly-Inconsistent with Supreme Court Precedent	6
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE PETITION	12
A. This Court Should Define the Scope of the Fraudulent Joinder Doctrine and Establish Clear Standards To Be Applied by Federal Courts in Determining Whether a Non-Diverse Defendant Has Been Joined in Good Faith and What Courts May Consider in Making that Determination	12
1. The Definitions and Tests for Fraudulent Joinder Differ Among the Federal Courts	14

TABLE OF CONTENTS—Continued

Page

2. Federal Courts Employ Different Procedures to Determine if a Non-Diverse Defendant is Fraudulently Joined 17

3. The Standards and Tests Do Not Comport with This Court's Decisions 17

B. This Court Should Clarify the Burden of Proof for Establishing Fraudulent Joinder 19

C. The Ninth Circuit's Decision Conflicts with this Court's Decision in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921) 22

D. The Ninth Circuit's Decision Conflicts with this Court's Decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), and earlier U.S. Supreme Court Decisions 23

CONCLUSION 27

Appendix A—Judgment of the Ninth Circuit Court of Appeals Filed and Entered April 2, 2007 ..... 1a

Appendix B—Memorandum of the Ninth Circuit Court of Appeals Filed April 2, 2007 ..... 2a

Appendix C—Judgment of the United States District Court, Central District of California, Central Division, Filed and Entered March 22, 2005 ..... 5a

Appendix D—Order of the United States District Court, Central District of California, Central Division, Granting Defendant's Motion for Summary Judgment Filed March 10, 2005 ..... 7a

Appendix E—Order of the United States District Court, Central District of California, Central Division, Vacating Order to Show Cause Docketed April 28, 2004 ..... 10a

TABLE OF CONTENTS—Continued

Page

Appendix F—28 U.S.C. § 1332(a)-(c) 12a

Appendix G—28 U.S.C. § 1441(a)-(c) 14a

Appendix H—28 U.S.C. § 1446(a), (b), and (d) 15a

Appendix I—28 U.S.C. § 1447 ..... 17a

Appendix J—Notice of Removal of Civil Action to United States District Court Under 28 U.S.C. § 1441(b) (Diversity) and Exhibits Thereto Filed March 4, 2004 ..... 19a

Appendix K—Order of the United States District Court, Central District of California, Central Division, to Show Cause Re: Removal Docketed on March 22, 2004 ..... 67a

Appendix L—Defendant's Response to the Order to Show Cause in Writing Why Removal Is Appropriate; Memorandum of Points and Authorities in Support Thereof and Exhibits Thereto Filed April 16, 2004 ..... 69a

TABLE OF AUTHORITIES

CASES Page

Alabama G. S. R. Co. v. Thompson,
200 U.S. 206 (1906) 2

American Fire & Casualty Co. v. Finn,
341 U.S. 6 (1951) 24

Anderson v. Home Ins. Co.,
724 F.2d 82 (8th Cir. 1983) 12

Baggs v. Martin,
179 U.S. 206 (1900) 24

Boyer v. Snap-On Tools Corp.,
913 F.2d 108 (3d Cir. 1990) *cert. denied*
498 U.S. 1085 (1991) 14

Caterpillar, Inc. v. Lewis,
519 U.S. 61 (1996) ..... i, 7, 23, 24, 25

Chesapeake & O. R. Co. v. Dixon,
179 U.S. 131 (1900) 5

Clarence E. Morris, Inc. v. Vitek,
412 F.2d 1174 (9th Cir. 1969) 9

Davis v. Standard Oil Co.,
47 F.2d 48 (8th Cir. 1931) 21

Filla v. Norfolk & Southern Ry.,
336 F.3d 806 (8th Cir. 2003) 14, 16

Florence v. Crescent Resources, LLC,
484 F.3d 1293 (11th Cir. 2007) 15

Gray v. Beverly Enterprises-Mississippi, Inc.,
390 F.3d 400 (5th Cir. 2004) 15

Grubbs v. General Elec. Credit Corp.,
405 U.S. 699 (1972) 24

TABLE OF AUTHORITIES—Continued

Page

Hardaway v. Merck & Co., Inc.,
2006 WL 2349965 (S.D. Ill. 2006) 21

Hartley v. CSX Transp., Inc.,
187 F.3d 422 (4th Cir. 1999) 15

Hauck v. ConocoPhillips Co.,
2006 WL 1596826 (S.D. Ill. 2006) 22

Herzig v. Twentieth Century-Fox Film Corp.,
129 F. Supp. 845 (S.D. Cal. 1955) 10

In re Briscoe,
448 F.3d 201 (3d Cir. 2005) 14

In re Library Editions of Children's Books,
299 F. Supp. 1139 (J.P.M.L. 1969) 26

Jerome-Duncan, Inc. v. Auto-by-Tel, L.L.C.,
176 F.3d 904 (6th Cir. 1999) 14

Jewell v. Dudley L. Moore Insurance, Inc.,
872 F. Supp. 1517 (M.D. La. 1995) 27

Knutson v. Allis-Chalmers Corp.,
358 F. Supp. 2d 983 (D. Nev. 2005) 21

Lane v. Champion Int'l Corp.,
827 F. Supp. 701 (S.D. Ala. 1993) 21

Lewis v. Time, Inc.,
710 F.2d 549 (9th Cir. 1983) 25

Louisville & N. R. Co. v. Wangelin,
132 U.S. 599 (1890) 3, 5, 18, 20

McCabe v. General Foods Corp.,
811 F.2d 1336 (9th Cir. 1987) 11, 16, 25

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.,
526 U.S. 344 (1999) 26

TABLE OF AUTHORITIES—Continued

	Page
Nagle v. Lee, 807 F.2d 435 (5th Cir. 1987)	26
Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989)	27
Parnas v. General Motors Corp., 879 F. Supp. 91 (E.D. Mo. 1995)	16
Phillips Petroleum Co. v. AIG Tech. Servs., Inc., 99 F. Supp. 2d 787 (S.D. Tex. 2000)	22
Plymouth Consolidated Gold-Mining Co. v. Amador & Sacramento Canal Co., 118 U.S. 264 (1886)	19
Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875 (1st Cir. 1983)	16
Reeb v. Wal-Mart Stores, 902 F. Supp. 1857-88 (E.D. Mo. 1995)	16
Saucier v. Katz, 533 U.S. 194 (2001)	26
Schwartz v. State Farm Mut. Auto. Ins. Co., 174 F.3d 875 (7th Cir. 1999)	15
Schwenn v. Sears, Roebuck & Co., 822 F. Supp. 1453 (D. Minn. 1993)	17
Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568 (5th Cir. 2004) (en banc), *cert. denied* 544 U.S. 992 (2005)	15
Smoot v. Chicago, R. I. & Pac. R.R. Co., 378 F.2d 879 (10th Cir. 1967)	15, 17
Travis v. Irby, 326 F.3d 64447 (5th Cir. 2003)	14

TABLE OF AUTHORITIES—Continued

Page

Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176 (1907) ..... *passim*

Whitaker v. Amer. Telecasting, Inc., 261 F.3d 196 (2d Cir. 2001) 15

Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921) ..... *passim*

STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 1332 2

28 U.S.C. § 1441 2

28 U.S.C. § 1446 2

28 U.S.C. § 1447 2

OTHER AUTHORITIES

16 James Wm. Moore et al., Moore's Federal Practice, P 107.14[2][c] [iv][A] (3d ed. 2000) .. 14

IN THE

Supreme Court of the United States

No. 06-___

BARR LABORATORIES, INC.,
Petitioner,

v.

MEERA SAMANTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is not a reported decision. A copy of the Court's Judgment and Memorandum are reprinted in the Appendix ("App.") at 1a-4a. The trial court's decisions relating to removal of the action from the Superior Court of the State of California for the County of Orange are reprinted at App. 5a-11a.

JURISDICTION

The Ninth Circuit Court of Appeals rendered its decision on April 2, 2007. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 28 U.S.C. § 1332(a), (b), and (c); 28 U.S.C. § 1441(a), (b), and (c); 28 U.S.C. § 1446(a), (b), and (d); and, 28 U.S.C. § 1447, which are set forth in the Appendix at 12a-18a.

INTRODUCTION

A. Certiorari Should Be Granted To Clarify Existing Ambiguity Regarding the Law Related to Removal of Actions from State to Federal Court

This case presents a rare opportunity for the Court to provide long-overdue guidance to the federal judiciary regarding a doctrine with roots embedded in century-old precedent – a doctrine not addressed by this Court in almost 90 years. This Court has recognized for over 100 years that "Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." *Alabama G. S. R. Co. v. Thompson*, 200 U.S. 206, 218 (1906).

Although the early decisions of this Court established the basic framework for fraudulent joinder analysis, some aspects of the doctrine were left unaddressed or undeveloped. The doctrine was born at a time when the removal statute permitted a separable controversy against a diverse defendant to be removed to federal court notwithstanding the plaintiff alleged claims against other non-diverse defendants. The test for removal of a controversy, as developed at that time, focused on the nature of the plaintiff's claims; i.e., were the claims as alleged separable or non-separable. The touchstone of that determination was the plaintiff's pleading and the question was whether plaintiff's claim asserted a joint liability or merely a several liability against the non-diverse defendant.

In early cases, a non-resident defendant often argued that the plaintiff improperly alleged a joint claim against it and a

non-diverse defendant in order to preclude removal of the action to federal court. In response, this Court stated that

> in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition, or in the affidavit of the petitioner – unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.

Louisville & N. R. Co. v. Wangelin, 132 U.S. 599, 601 (1890). As defendants frequently did no more than make conclusory statements that the plaintiff's claims were not joint and that the plaintiff had fraudulently joined a resident defendant to preclude removal, the test applied to determine fraudulent joinder often focused on the nature of the plaintiff's claim; i.e., joint or several, as determined from the plaintiff's pleading.

However, that courts may consider evidence outside of the pleadings was actually established by the first case in which this Court found a resident defendant had been fraudulently joined. In *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907), the court relied not only upon the pleadings, but also upon evidence presented to the court by way of affidavits. The defendant in *Wecker* alleged in its removal petition that the resident defendant had been fraudulently joined in plaintiff's complaint in order to defeat defendant's right to removal. In addition, the defendant submitted affidavits to support the allegations in the removal petition. *Id.* at 180-81. The plaintiff in response to the removal petition also filed an affidavit. *Id.* at 181. On appeal from the lower court's decision granting defendant's removal petition, the plaintiff argued that the lower court erred in considering the affidavits and should have limited its decision regarding the

fraudulent joinder of the non-diverse defendant to the allegations in the complaint. This Court rejected the plaintiff's contention and approved the district court's consideration of all the evidence before it in making its determination. In the end, this Court concluded that the plaintiff did not make the "slightest attempt" to support the allegations in his complaint against the resident defendant and agreed with the lower court's finding that the resident defendant was fraudulently joined and affirmed removal of the action. *Id.* at 186.

Futhermore, the last time this Court addressed the issue of fraudulent joinder, in 1921, its decision made clear that consideration of plaintiff's good faith intent in prosecuting claims against a non-diverse defendant was appropriate. In *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), the defendant asserted in its removal petition that "it was not [the] purpose of the plaintiff to prosecute the action in good faith" against the resident defendant. *Id.* at 94. In plaintiff's motion to remand the case, the plaintiff did not "in any wise traverse or take issue with any of the allegations of the petition for removal." *Id.* at 95. Although it noted the defendant must carry the burden of proof, the Court stated that "if the plaintiff does not take issue with what is stated in the petition, he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it." *Id.* at 97-98. As a result, the Court affirmed the lower court's denial of plaintiff's motion to remand concluding "the joinder was a sham and fraudulent – that is, without any reasonable basis in fact and without any purpose to prosecute the cause in good faith against the [resident defendant] – the result must be the same whether the local law makes for or against a joint liability." *Id.* at 98-99.

In the 90 or so years since *Wecker* and *Wilson* were decided, federal courts have strayed from or even ignored the doctrine as established by this Court. This may be due to some perceived inconsistencies in this Court's earliest cases.

For example, in addressing claims of fraudulent joinder, this Court acknowledged a defendant could attack the "good faith" of the plaintiff in the action and stated that a defendant could allege fraud on the part of the plaintiff in joining a resident defendant. *See Wangelin*, 132 U.S. at 603 (affirming denial of removal petition noting "it is enough to say that no fraud was alleged in the petition for removal, or pleaded, or offered to be proved in the Circuit Court," but not stating it is necessary to allege or prove fraud by plaintiff in joining non-diverse defendant); *Chesapeake & O. R. Co. v. Dixon*, 179 U.S. 131, 135 (1900) (affirming denial of removal petition noting the "petition for removal did not charge fraud . . . or set up any facts and circumstances indicative thereof," but not stating it is necessary to allege or prove fraud by plaintiff in joining non-diverse defendant). Yet, those same cases also noted that the plaintiff's "motive" or "purpose" in joining diverse and non-diverse defendants was not open to inquiry. *See Dixon*, 179 U.S. at 135 (noting "plaintiff's motive in the performance of a lawful act [alleging a joint cause of action] was not open to inquiry"). Many federal courts have adopted the Court's statements that the plaintiff's "motive" is not open to inquiry, but have ignored the Court's positive proclamation that the "good faith" of the plaintiff is open to inquiry in determining if a resident defendant has been wrongfully joined in an action to preclude removal. As a result, federal courts often limit the fraudulent joinder inquiry to whether a plaintiff has stated a viable claim against the resident defendant in the complaint, ignoring facts that establish the plaintiff never intended in good faith to prosecute a claim against the resident defendant.

In addition, since the Court last spoke to the issue decades ago, the removal statute has changed and the Federal Rules of Civil Procedure have been adopted. With those developments, removal of an action from state to federal court no longer turns on the separable or non-separable nature of the claims against the defendants. Without subsequent guidance

from this Court, federal courts have been left to reconcile on their own this Court's jurisprudence with the removal statute and the requirements established by the Federal Rules of Civil Procedure. The result is a conflict among the federal courts regarding the standards and procedures to apply when determining whether a plaintiff has joined a non-diverse defendant in good faith, as opposed to those circumstances where the resident defendant was joined solely for the purpose of divesting the diverse defendant of its right to seek federal court jurisdiction. Existing precedent from this Court does not fully address the complex and myriad issues arising in lawsuits around the country that are removed to federal court today.

Increasingly, plaintiffs are employing new and novel strategies to frustrate defendants' legitimate rights to remove actions to federal court. As the fraudulent joinder doctrine plays an ever more critical role in determining the jurisdiction of federal courts in actions removed from state courts, it is imperative that lower federal courts receive clear guidance regarding its scope and application. In the absence of that guidance, courts and parties often are left to guess as to what constitutes a good faith joinder of a non-diverse defendant; particularly, what standard will be employed in making the determination, how the burden of establishing that the joinder of a resident defendant is not in good faith is satisfied, and what evidence may be considered in making the determination. This Court should grant review of this case in order to resolve the issues involving removal and good faith joinder of non-diverse defendants.

B. The Ninth Circuit's Decision, Based on the Facts of this Case, Is Wholly-Inconsistent with Supreme Court Precedent

In addition, the Court should grant review of this case as the Ninth Circuit's decision conflicts with this Court's prior precedent, including its decision in *Wilson v. Republic Iron &*

Steel Co., 257 U.S. 92 (1921), and the Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996).

In *Wilson*, this Court held that if the plaintiff does not take issue with or object to the statements made in the removal petition, he "must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it." *Wilson* at 98. Here, plaintiff neither took issue with the statements made in defendant's removal petition and supporting documents nor with those in the response and supporting documents filed by defendant pursuant to a show cause order issued by the district court. Under the Court's holding in *Wilson*, plaintiff admitted the statements in defendant's removal papers. As a result, affirmance of the removal and subsequent judgment on behalf of defendant was warranted, and thus the Ninth Circuit's decision was incorrect.

That the Ninth Circuit's decision contradicts this Court's precedent is further supported by this Court's decision in *Caterpillar*. In *Caterpillar*, this Court instructed that if diversity did exist at the time judgment was entered, a judgment should be affirmed even though it did not at the time of removal. Here, although plaintiff pled the necessary elements of valid claims against the non-diverse defendant, plaintiff never served the non-diverse defendant – not prior to removal, after removal, or at any time prior to entry of final judgment. As a result, the non-diverse defendant never became a party to the litigation, and at the time judgment was entered in favor of defendant, complete diversity existed warranting affirmance under *Caterpillar* of the judgment for defendant.

STATEMENT OF THE CASE

This is a wrongful death action originally filed in the Superior Court of the State of California, Orange County. Pro se plaintiff Meera Samanta's complaint contained product liability claims against Barr Laboratories, Inc. ("Barr"), a Delaware corporation with its principal place of business in New

York, and medical malpractice and lack of informed consent claims against Olina Harwer, M.D., a California resident. (*See* App. at 37a-47a.) Mrs. Samanta alleged she was a resident of California. (*See* App. at 35a.)

Upon the filing of her complaint on November 13, 2003, the clerk of the Superior Court issued a summons that included "Notice to Defendant: (Aviso a Acusado) Olina Harwer, M.D., Barr Laboratories, Inc., and Does 1 through 100, Inclusive." (*See* App. at 30a.) Mrs. Samanta served Barr on January 12, 2004. (*See* App. at 26a.) However, Mrs. Samanta never served Dr. Harwer or any John Doe defendants. (*See id.*) Dr. Harwer never filed an answer or otherwise appeared in the state court action. (*See id.*)

On February 24, 2004, Barr first learned that Mrs. Samanta had not served Dr. Harwer. Rule 201.7(b) of the California Rules of Court provides: "The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the filing of the complaint." Barr also discovered that Mrs. Samanta had not applied for a state court order extending the time to serve a pleading, as provided by the California Code of Procedure ("C.C.P.") Rule 201.7(e). (*See id.*) There also was no indication the state court on its own motion had extended or otherwise modified the C.C.P. Rule 201.7 requirement that the complaint be served on all named defendants and proofs of service on those defendants be filed within 60 days after the filing of the complaint. (*See id.*) In addition, Dr. Harwer had not answered the Complaint. (*See id.*)

On March 4, 2004, Barr filed a removal petition to comply with the 30-day requirement in 28 U.S.C. § 1441. (*See* App. at 19a-66a.) Less than two weeks later, on March 18, 2004, the district court ordered Barr to show cause, in writing, why the case should not be remanded. (*See* App. at 67a-68a.) In that order, Judge Taylor quoted the following language from

the Ninth Circuit Court of Appeals' decision in *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174 (9th Cir. 1969):

> A nonresident defendant cannot remove a 'nonseparable' action if the citizenship of any codefendant, joined by the plaintiff in good faith, destroys complete diversity, regardless of service or nonservice upon the codefendant . . . . Whenever federal jurisdiction in a removal case depends upon complete diversity, the existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service.

(*See id.*) The district court went on to note that "[a]lthough Dr. Harwer has not been served or responded to the complaint, [s]he remains a named defendant. Removal does not appear appropriate." (*Id.*)

Barr filed its response to the district court's show cause order on April 16, 2004. (*See* App. at 69a-81a.) In its response, Barr averred that Mrs. Samanta had no intention of prosecuting an action against Dr. Harwer. Barr stated that "even in the face of Barr's removal petition, filed over a month ago on grounds of fraudulent joinder, plaintiff has continued to evince her lack of intention to serve Dr. Harwer." (*See* App. at 74a.)

Mrs. Samanta never attempted to refute any of Barr's contentions relating to removal. She did not respond to Barr's initial removal petition; she did not respond to the district court's show cause order; and she did not respond to Barr's brief in response to the district court's show cause order. In addition, even though she clearly was on notice Dr. Harwer had not been served, Mrs. Samanta never served or even attempted to serve Dr. Harwer.

As a result, on April 23, 2004, the district court vacated its order to show cause, thereby retaining jurisdiction. (*See* App. at 10a-11a.) In its order, the district court noted that "[a]t this stage, it appears Defendant Dr. Harwer is joined fraudulently

and removal is appropriate." (*See* App. at 10a.) In support of its conclusion, the district court relied on *Herzig v. Twentieth Century-Fox Film Corp.*, 129 F. Supp. 845, 848 (S.D. Cal. 1955), which held that

> where it appears that the plaintiff has no intention of serving the resident defendants and attempting to recover judgment against them, the Court is justified in concluding, as a matter of fact, that they were joined in bad faith for the sole purpose of preventing Federal jurisdiction, and that, hence, the joinder is fraudulent.

(App. at 10a-11a.)

However, the district court's order also extended a second invitation to Mrs. Samanta to challenge the removal. Specifically, the court's order advised Mrs. Samanta that "[i]f appropriate at a future time, Plaintiff may make a showing of the good faith joinder of Dr. Harwer." (App. at 11a.) Yet again, Mrs. Samanta, who by her own admission had the "unofficial" assistance of counsel in filing her case, failed to take any action – she did not object to the district court's conclusion, she did not seek the issuance of a summons from the district court, and she did not attempt to serve a state court summons. Instead, Mrs. Samanta pursued her action solely against Barr for more than a year.

Throughout the course of the case, as it proceeded in federal court, Mrs. Samanta never directed discovery to Dr. Harwer, she never served any papers or pleadings on Dr. Harwer, and did not otherwise prosecute any claims against Dr. Harwer.

Following the close of discovery, Barr filed a motion for summary judgment. After Barr's summary judgment motion was fully briefed, and just two days before the district court issued its order ruling on Barr's motion for summary judgment, Mrs. Samanta filed an Ex Parte Application For Review of Barr Laboratories, Inc., Removal of Lawsuit to

Federal Court. At that point, and at the time judgment was entered, Mrs. Samanta still had not served Dr. Harwer or requested the issuance of a summons for Dr. Harwer from the district court.

On March 10, 2005, the district court issued an order granting Barr's motion for summary judgment and denying Mrs. Samanta's ex parte application requesting review of the court's earlier order on removal. (*See* App. at 7a-9a.) The judgment of the district court was entered on March 22, 2005. (*See* App. at 5a-6a.)

On March 28, 2005, Mrs. Samanta filed a Notice of Appeal. In her notice she indicated she was appealing not only the district court's grant of summary judgment in favor of Barr, but also the district court's order denying her ex parte application for a review of the court's order permitting removal, the district court's order vacating the order to show cause why the case should not be remanded, and the order denying her ex parte motion for an extension of the discovery deadline. In her appellate brief, Mrs. Samanta addressed only the district court's orders regarding removal.

In a three-page memorandum, the Ninth Circuit vacated the district court's order and remanded with instructions to remand the case to state court. (*See* App. at 2a-4a.) The Ninth Circuit stated that the district court could exercise subject matter jurisdiction over this action only if Dr. Harwer, the non-resident defendant, was fraudulently joined. (App. at 3a.) According to the Ninth Circuit,

> "'[f]raudulent joinder' is a term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

(*Id.*)

The Ninth Circuit held that the district court misapplied the fraudulent joinder test. (App. at 3a.) According to the court,

> [t]he key inquiry is whether Samanta's complaint put forward any viable theory against Dr. Harwer. Samanta's complaint pleads each element of a cause of action for medical negligence and lack of informed consent against Dr. Harwer. Furthermore, Barr does not offer any argument or facts challenging the viability of these claims. Since Barr did not meet its burden of proving that Dr. Harwer was fraudulently joined, removal was inappropriate.

(App. at 3a-4a.)

REASONS FOR GRANTING THE PETITION

A. This Court Should Define the Scope of the Fraudulent Joinder Doctrine and Establish Clear Standards To Be Applied by Federal Courts in Determining Whether a Non-Diverse Defendant Has Been Joined in Good Faith and What Courts May Consider in Making that Determination

Although the Ninth Circuit stated the defendant is entitled to present facts showing the joinder of a non-diverse defendant is fraudulent, its decision indicates that the only facts a defendant may present to establish fraudulent joinder are facts tending to show the claims alleged by the plaintiff against the non-diverse defendant "fail to state a cause of action" against that defendant. (*See* App. at 3a.) The Ninth Circuit is not alone among the federal courts in limiting the inquiry on the question of fraudulent joinder to the validity of the plaintiff's claims against the non-diverse defendant as reflected in the plaintiff's complaint. *See, e.g., Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983) (noting it had articulated a standard close to a dismissal standard, approving a removal to federal court, if "on the face of plaintiff's state court pleadings, no cause of action lies against the resident defendant").

In doing so, federal courts have strayed from the doctrine as established by this Court. In those federal courts where a plaintiff need only state a claim against any non-resident defendant to deprive the true target (non-resident) defendant of federal court jurisdiction, the doctrine of fraudulent joinder as established by this Court has been completely eviscerated.

This Court's decisions establish that where the plaintiff does not show a good faith intent to prosecute a claim against a non-diverse defendant, the joinder is a sham and fraudulent. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907). In *Wecker*, the inquiry was not limited to whether the plaintiff stated a viable claim against the defendant, and the Court considered more than merely the plaintiff's pleading.

Since this Court last addressed the fraudulent joinder doctrine, many federal court decisions have focused on a portion of the Court's decisions to the exclusion of the rest. The "good faith" and "intent to prosecute" aspects essentially have disappeared from the doctrine. Yet, in today's legal climate, especially with the advent of notice pleading, it is the rare plaintiff who cannot recite all the elements of a viable claim against any defendant without having any intention of pursuing that claim. Indeed, plaintiff trial attorney groups advocate ways in which plaintiffs can preclude a defendant from removing an action to federal court. Any number of methods exist for a plaintiff to state a viable claim against a non-diverse defendant while having no intention to prosecute that claim. This case presents just such an example – the complaint contains the necessary elements of a claim against a non-diverse defendant, but the plaintiff's acts (and omissions) lead to the inescapable conclusion that plaintiff never intended to prosecute those claims against the resident defendant in this lawsuit.

1. The Definitions and Tests for Fraudulent Joinder Differ Among the Federal Courts

In straying from the doctrine as initially developed by this Court and effectively eliminating the "good faith" and "intent to prosecute" aspects, federal courts have developed different definitions and tests of fraudulent joinder. *See Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003) (containing an in-depth discussion of the various mutations of the fraudulent-joinder standard throughout the circuits).[1] For instance, in some courts joinder is fraudulent if there is "no reasonable basis" in law or fact supporting the claim. *See Filla v. Norfolk & Southern Ry.*, 336 F.3d 806, 810 (8th Cir. 2003) (stating "joinder is fraudulent when there exists no reasonable basis in fact and law supporting a claim . . . ."); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) *cert. denied* 498 U.S. 1085 (1991) (stating "joinder is fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant"). *But see In re Briscoe*, 448 F.3d 201, 217 (3d Cir. 2005) (stating "[j]oinder is fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment"). Other courts employ a slightly different variation of the "reasonable basis" definition. *See Jerome-Duncan, Inc. v. Auto-by-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999) (stating fraudulent joinder exists if the plaintiff did not have at

---

[1] In *Travis*, 326 F.3d at 647, the court noted that even relevant treatises have not been entirely consistent. "Moore's Federal Practice states at one point: 'To establish fraudulent joinder, a party must demonstrate . . . the absence of any possibility that the opposing party has stated a claim under state law.' 16 James Wm. Moore et al., Moore's Federal Practice, P 107.14[2][c] [iv][A] (3d ed. 2000). It then comments: 'The ultimate question is whether there is arguably a reasonable basis for predicting that state law might impose liability on the facts involved.'" *Id.*

least "a colorable claim against the non-diverse defendant in state court"); *Smoot v. Chicago., R. I. & Pac. R.R. Co.*, 378 F.2d 879, 881 (10th Cir. 1967) (stating the joinder is fraudulent if the allegations are without factual basis and a complete sham).

Courts in the Fourth, Second, and Eleventh Circuits use a definition of "no possibility" of recovery. *See, e.g., Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) (noting fraudulent joinder exists where "there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant"); *Whitaker v. Amer. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001) (stating defendant is fraudulently joined where "there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court"); *Florence v. Crescent Resources, LLC*, 484 F.3d 1293, 1297 (11th Cir. 2007) (stating joinder is fraudulent if "there is no possibility the plaintiff can establish a cause of action against the resident defendant").

The Fifth and Seventh Circuits state fraudulent joinder exists where there is "no reasonable possibility of recovery." *See, e.g., Gray v. Beverly Enterprises-Mississippi, Inc.*, 390 F.3d 400, 405 (5th Cir. 2004) (noting fraudulent joinder exists where the plaintiff does not have a "reasonable possibility of recovery in state court")[2]; *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999) (stating fraudulent joinder exists if there is "no reasonable possibility that a state court would rule against the [in-state] defendant").

---

[2] *But see Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc), *cert. denied* 544 U.S. 992 (2005) (noting fraudulent joinder exists where defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant).

The First and Ninth Circuits define fraudulent joinder as a "failure to state a claim." *See, e.g., Polyplastics, Inc. v. Transconex, Inc.*, 713 F.2d 875, 877 (1st Cir. 1983) (stating "fraudulent joinder bears an implicit finding that the plaintiff has failed to state a cause of action against the [non-diverse] defendant . . . ."); *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) (stating "[f]raudulent joinder is a term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent").

Even within a circuit, the district courts apply varying standards. *See, e.g., Filla v. Norfolk & Southern Ry.*, 336 F.3d 806 (8th Cir. 2003) (noting "[i]n *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983), we articulated something close to a dismissal standard, approving a removal to federal court, if 'on the face of plaintiff's state court pleadings, no cause of action lies against the resident defendant.' As might be expected, our district courts have used standards that run the gamut-from requiring plaintiff to actually state a cause of action, to a more lenient threshold requiring a removing party to show that there is no possibility that the plaintiff will be able to state a cause of action against the resident defendant. *E.g., Reeb v. Wal-Mart Stores*, 902 F. Supp. 185, 187-88 (E.D. Mo. 1995); *Parnas v. General Motors Corp.*, 879 F. Supp. 91, 92 (E.D. Mo. 1995).").

There are at least three different definitions and tests employed by the federal courts in deciding the question of fraudulent joinder. Those differences result in an inconsistency of result depending on the jurisdiction in which the case is filed and the issue is raised.[3]

---

[3] One of the unintended consequences of the conflicts among the federal circuit courts is prejudice to a defendant depending on where an

2. Federal Courts Employ Different Procedures to Determine if a Non-Diverse Defendant is Fraudulently Joined

Along with employing different definitions and tests, the federal courts employ different procedures to determine if a non-diverse defendant is fraudulently joined. Some courts hold that the plaintiff's complaint may not be pierced in deciding the questions of fraudulent joinder, *see, e.g., Schwenn v. Sears, Roebuck & Co.*, 822 F. Supp. 1453, 1455 (D. Minn. 1993), while others hold the complaint may be pierced, *see, e.g., Smoot*, 378 F.2d 879. Of those courts that permit piercing of the pleadings, some permit only limited piercing, while others engage in much broader piercing.

3. The Standards and Tests Do Not Comport with This Court's Decisions

These various and conflicting definitions, tests, and procedures fail to comport with the doctrine as established by this Court in the late 19th and early 20th centuries. This Court's decision in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921), made clear that a joinder is a sham and fraudulent where plaintiff "without any purpose to prosecute the action in good faith" against the resident defendant joins the defendant in the complaint. The Court's statement of the doctrine is not, never has been, and should not be, limited to whether a plaintiff merely has stated a claim against the non-diverse defendant in the complaint.

Equally clear from this Court's decisions is the notion that courts are not limited to making the determination of fraudulent joinder by the pleadings alone. It is only where the removing defendant does not allege and show the defendant was wrongfully made a party that the propriety of removal is

---

action is filed. A defendant's right to avail itself of federal court jurisdiction should not be dependant upon where an action is filed.

based upon the complaint alone. *See Louisville & N. R. Co. v. Wangelin*, 132 U.S. 599, 601 (1890) (holding "in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition, or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court").

That the court's inquiry into the fraudulent joinder of a non-diverse defendant should not be limited to only the pleadings is evidenced by the Court's decision in *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 180 (1907). In *Wecker*, the plaintiff complained that rather than looking only to the complaint, the district court considered affidavits filed by the parties in determining whether the action should be remanded. The *Wecker* Court noted the distinction between cases in which plaintiff's complaint was the only document on record at the time the removal petition is filed and those in which the parties filed documents in support of and in opposition to the removal. *Id.* at 181-82. The Court acknowledged that in the former instance only the pleading would be considered in determining whether the action should be remanded. *Id.* at 182.

However, for cases that fell within the second instance, the Court approved consideration of the affidavits, noting that in cases in which it is shown by the removal petition or otherwise that the plaintiff is attempting to sue in state court with a view to defeat the defendant's right to federal jurisdiction, different questions arise. *Id.* at 182. In such instances, the Court stated federal courts not only may, but also should, take such action as will defeat attempts to wrongfully deprive parties entitled to federal court jurisdiction of the protection of their rights. *Id.* at 183. The Court affirmed the district

court's conclusion that the non-diverse defendant was joined merely for the purpose of defeating defendant's right to remove the case to federal court based on the complaint, coupled with the affidavits filed in support of and in opposition to removal. *Id.* at 186.

This Court should grant certiorari to address the scope of the fraudulent joinder doctrine and establish clear standards to be employed by federal courts in making the determination of whether a non-diverse defendant has been fraudulently joined.

B. This Court Should Clarify the Burden of Proof for Establishing Fraudulent Joinder

In its decision, the Ninth Circuit ignored numerous facts that were before the district court both when it vacated its show cause order regarding the removal and when it denied plaintiff's eleventh-hour attempt to avoid entry of judgment against her. The Ninth Circuit, without discussion, concluded that Barr did not meet its burden of proving that Dr. Harwer was joined fraudulently. However, the Ninth Circuit focused only on whether Barr presented argument or facts challenging the viability of Mrs. Samanta's claims, ignoring facts that showed Mrs. Samanta did not in good faith intend to prosecute the action against Dr. Harwer. That construction of the defendant's burden of proof strays from this Court's decisions which acknowledged that a defendant could establish the joinder of a resident defendant was fraudulent if the defendant showed the plaintiff did not have good faith intent to prosecute a claim against the resident defendant.

Very early on, this Court held the removing party had the burden of showing removal was proper, including where it was alleged that the non-diverse defendant was joined in an effort to preclude the defendant from removing the case. *See Plymouth Consolidated Gold-Mining Co. v. Amador & Sac-*

ramento Canal Co., 118 U.S. 264, 270-71 (1886). *See also Louisville & N. R. Co. v. Wangelin*, 132 U.S. 599, 602 (1890).

Then in *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185 (1907), this Court affirmed the denial of plaintiff's motion to remand because the plaintiff failed to make even the "slightest attempt" to support the allegations in the complaint in response to defendant's affidavits in support of removal. In rejecting plaintiff's objection that there was no proof that the plaintiff knew of the facts as recited in defendant's affidavit in support of removal, the Court explained that "even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach." *Id.*

The burden of proof was addressed again in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921). In *Wilson*, the defendant in the removal petition alleged that "it was not [the] purpose of the plaintiff to prosecute the action in good faith" against the non-diverse defendant. *Id.* at 94. In his motion to remand, the plaintiff did not take issue with or object to any of the statements made in the defendant's removal petition supporting the allegation of plaintiff's lack of intent to prosecute. *Id.* at 95. Instead, the plaintiff merely challenged the removal on the grounds that one of the defendants was a resident of the state. In affirming the denial of plaintiff's motion to remand, this Court clearly stated that if

> a resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly leading to that conclusion apart from the pleader's deductions. [Citations omitted.] The petition must be verified . . . , and its statements must be taken by the state court as true [citations omitted]. If a removal is effected, the plaintiff may, by a motion to remand, plea, or answer, take issue with the statements in the petition. If he does, the issues so arising must be

> heard and determined by the District Court [citations omitted] and at the hearing the petitioning defendant must take and carry the burden of proof, he being the actor in the removal proceeding [citations omitted]. But if the plaintiff does not take issue with what is stated in the petition, he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it. [Citations omitted.]

Id. at 97-98. The Court concluded that the plaintiff's failure to refute or object to the allegations in the removal petition made it apparent the resident defendant was "joined as a defendant without any purpose to prosecute the action in good faith as against him with the purpose of fraudulently defeating the [diverse defendant's] right of removal." *Id.* at 98.

The Court's decisions in *Wecker* and *Wilson* establish, if not explicitly, at least implicitly, that if a defendant makes a prima facie showing that a non-diverse defendant has been joined only to defeat the defendant's right to removal, the plaintiff must come forward with some evidence to show the non-diverse defendant was joined in good faith. However, the lower federal courts have departed from this Court's precedent and applied a different and nearly insurmountable burden of proof. *See, e.g., Davis v. Standard Oil Co.*, 47 F.2d 48, 50-51 (8th Cir. 1931) (holding "[t]he burden of proof is upon the removing defendant, and the fraud of the plaintiff must be proven by evidence that is clear and convincing"). The principle as developed and applied by some federal courts does not permit shifting of the burden to the plaintiff. *See, e.g., Knutson v. Allis-Chalmers Corp.*, 358 F. Supp. 2d 983 (D. Nev. 2005) (noting burden of proof on issue of fraudulent joinder may not be shifted to plaintiff); *Hardaway v. Merck & Co., Inc.*, 2006 WL 2349965 (S.D. Ill. 2006) (noting court does not shift burden of proof on claim of fraudulent joinder to plaintiffs). *But see Lane v. Champion Int'l Corp.*, 827 F. Supp. 701 (S.D. Ala. 1993) (stating that if

defendant satisfies initial burden, burden shall shift to plaintiff to establish, at very least, genuine issue of fact exists concerning appropriateness of joinder).

Also in contrast to the Court's decision in *Wecker*, some lower federal courts do not require that a plaintiff submit affidavits or other evidence to rebut the allegations and evidence supplied by the removing defendant. *See Hauck v. ConocoPhillips Co.*, 2006 WL 1596826, n.4 (S.D. Ill. 2006) (noting a removing defendant's submission of evidence in support of a claim of fraudulent joinder does not impose a burden on plaintiff to submit evidence to disprove fraudulent joinder); *Phillips Petroleum Co. v. AIG Tech. Servs., Inc.*, 99 F. Supp. 2d 787, 791 (S.D. Tex. 2000) (noting although plaintiff on motion to remand could submit affidavits and deposition transcripts to rebut removing defendant's allegation of fraudulent joinder, plaintiff is not required to do so).

As a result, in today's federal courts, a defendant can present evidence showing a plaintiff has no intention to prosecute a claim against a non-diverse defendant and has merely joined that party to defeat removal of the action (as Barr did), and the plaintiff can remain silent, relying merely on the allegations in the complaint to defeat removal of the action (as Mrs. Samanta did). A plaintiff should not be permitted to remain silent, but should be required to marshal some evidence in opposing a defendant's removal of the action.

This Court should grant certiorari in this case in order to clarify and define the burden of proof for establishing fraudulent joinder.

C. The Ninth Circuit's Decision Conflicts with this Court's Decision in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921)

The Ninth Circuit's decision conflicts with this Court's decision in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921). In *Wilson*, this Court held that if the plaintiff does not

take issue with or object to the statements made in the removal petition, he "must be taken as assenting to its truth and the petitioning defendant need not produce any proof to sustain it." *Id.* at 97-98.

Barr provided evidence to the district court with its Notice of Removal to show Mrs. Samanta had not served Dr. Harwer within the time allowed under state service rules and contended that lack of service evidenced an intent by Mrs. Samanta not to prosecute her action against the doctor. (*See* App. at 26a, 22a.) In response to the district court's show cause order, Barr contended Mrs. Samanta did not intend to prosecute her action against Dr. Harwer and provided evidence that Dr. Harwer still had not been served in support of its contention. (*See* App. at 74a, 77a-81a.)

Mrs. Samanta never responded. Instead, plaintiff remained silent. By the time plaintiff filed her notice for reconsideration with the district court only days prior to entry of judgment in favor of Barr, plaintiff's actions throughout the litigation confirmed Barr's contention that plaintiff had no intention to pursue her claim against Dr. Harwer in this lawsuit. The case had been pending in federal court for over a year by that time and plaintiff still had not served Dr. Harwer, had not sought to have the district court issue a summons for Dr. Harwer, and had not asked the court to permit service on Dr. Harwer. Furthermore, plaintiff did not involve Dr. Harwer in any aspect of the litigation.

The Ninth Circuit ignored those facts. Doing so was in direct contradiction to this Court's decision in *Wilson*.

D. The Ninth Circuit's Decision Conflicts with this Court's Decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), and earlier U.S. Supreme Court Decisions

The Ninth Circuit order vacating the district court's judgment in favor of Barr conflicts with this Court's decision in

Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996), and earlier precedent of this Court, as well. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16 (1951) *superseded by statute on other grounds* (noting "[t]here are cases which uphold judgments in the district courts even though there was no right to removal" *citing Baggs v. Martin*, 179 U.S. 206 (1900).) *See also Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972) (noting "[l]ongstanding decisions of this Court make clear, however, that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court" in the posture the case was in at the time of judgment).

Caterpillar involved personal injury claims arising under state law. The case was removed to a federal court at a time when complete diversity of citizenship did not exist among the parties. *Caterpillar*, 519 U.S. at 64. Promptly after removal, the plaintiff moved to remand, but the district court denied that motion. *Id.* at 65-66. Before trial, all claims involving the non-diverse defendant were settled, and that defendant was dismissed as a party to the action. *Id.* at 66. The case proceeded to trial and judgment for the removing defendant. *Id.* at 66-67. The court of appeals vacated the judgment, concluding that, absent complete diversity at the time of removal, the district court lacked subject matter jurisdiction. *Id.* at 67.

This Court reversed based on an "overriding consideration," holding that "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Caterpillar*, 529 U.S. at 75. This Court held that "a district court's error in failing to remand a

case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Caterpillar*, 519 U.S. at 64. *See also McCabe v. General Foods Corp.*, 811 F.2d 1336, 1338 (9th Cir. 1987) (*citing Lewis v. Time, Inc.*, 710 F.2d 549, 552 (9th Cir. 1983) and stating "When a remand motion is denied and the case is tried on the merits, the issue is whether the district court would have had jurisdiction had the case been filed in federal court 'in the posture it had at the time of entry of judgment.' . . . . Diversity jurisdiction is measured by the final posture.").

Unlike Mrs. Samanta, who acquiesced in Barr's averments regarding the bad faith joinder of Dr. Harwer and subsequently failed to serve Dr. Harwer or take any action whatsoever to prosecute the case against her, the plaintiff in *Caterpillar* was diligent and "by timely moving for remand, did all that was required to preserve his objection to removal." *See Caterpillar*, 519 U.S. at 74.

At the time judgment was entered in this action, complete diversity existed between the only parties to the action, Mrs. Samanta and Barr, the only named and served defendant. The district court recognized in its order granting summary judgment that Dr. Harwer was not a party to this action. (*See* App. at 9a: "The fact that Doctor Harwer may have been involved in an arbitration proceeding with Plaintiff does not mean she is a party to this case.")

As a result, even if Barr had removed the action prematurely and the district court were not therefore required to ignore the presence of the resident defendant joined in bad faith, the fact that Dr. Harwer had not been made a party to the action by service of a complaint and summons prior to final judgment, rendered diversity complete when the district court entered judgment.

A defendant who is not served with a complaint is not a party to an action. *See Saucier v. Katz*, 533 U.S. 194, 212 n.1 (2001) (Ginsburg, J., dissenting) (stating: "Though named as a defendant, Parker was never served with the complaint, and therefore did not become a party to this litigation."); *In re Library Editions of Children's Books*, 299 F. Supp. 1139, 1142 (J.P.M.L. 1969) (holding that the term "parties" in 28 U.S.C. § 1407 should not be construed to include unserved defendants, as "'[p]arties' is ordinarily used to designate only those who are named as such in the record and who are properly served with process or enter their appearance."); *Nagle v. Lee*, 807 F.2d 435, 441 (5th Cir. 1987) (holding that appeal from judgment dismissing suit against all served defendants was sufficient for purposes of a "final decision" under 28 U.S.C. § 1291 because any remaining unserved defendants were not parties in the case, and therefore no certificate for interlocutory appeal was required under Rule 54(b)). *See also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347, 350 (1999) (stating, "[w]e read Congress' provisions for removal in light of a bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process"; and "[i]n the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as a defendant"; and "one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend").

To overcome the outcome dictated by *Caterpillar*, Mrs. Samanta argued that "sham" parties are not automatically eliminated from a suit and claimed that because Dr. Harwer was never dismissed from this action, "the jurisdictional defect that occurred upon the act of removal was never cured." Mrs. Samanta accepted, however, that had the

district court simply dismissed Dr. Harwer on its own motion, it would be beyond dispute that jurisdiction existed at the time of dismissal. Short of that, she claimed that any defect in removal remained uncured.

However, "once a matter is removed to federal court on the basis of fraudulent joinder, the non-diverse 'party' is no longer a party at interest." *See Jewell v. Dudley L. Moore Insurance, Inc.*, 872 F. Supp. 1517, 1520 (M.D. La. 1995). Furthermore, if the fact that Dr. Harwer was not formally dismissed created a housekeeping issue, the appellate court could have dismissed Dr. Harwer on its own motion. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

The Ninth Circuit's order vacating the district court's judgment is at odds with this Court's decision in *Caterpillar* and earlier decisions of this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

JOSEPH P. THOMAS *
LINDA E. MAICHL
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
(513) 698-5000

* Counsel of Record

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 2, 2007]

No. 05-55490
D.C. No. CV-04-00253-GLT

MEERA SAMANTA,
Plaintiff-Appellant,

v.

OLINA HARWER, MD,
Defendant,

and

BARR LABORATORIES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Central District of California (Santa Ana).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California (Santa Ana) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is VACATED and REMANDED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed APR 2, 2007]

No. 05-55490
D.C. No. CV-04-00253-GLT

MEERA SAMANTA,
Plaintiff-Appellant,

v.

OLINA HARWER, MD,
Defendant,

and

BARR LABORATORIES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Submitted March 7, 2007**
Pasadena, California

MEMORANDUM*

Before: RYMER, WARDLAW, and M. SMITH, *Circuit Judges.*

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiff Meera Samanta appeals the district court's judgment in favor of defendant Barr Laboratories, Inc. (Barr). Samanta argues that the district court erroneously determined that defendant Olina Harwer, M.D. (Dr. Harwer) was fraudulently joined and therefore incorrectly found that removal was appropriate. We agree.

We have jurisdiction under 28 U.S.C. § 1291, and "review the district court's legal determination as to the propriety of removal, like all questions of subject-matter jurisdiction, *de novo*." *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1215 (9th Cir. 2000) (citations omitted).

Because Samanta and Dr. Harwer's California residency prevents complete diversity, the district court's power to exercise subject matter jurisdiction depends on a finding that Dr. Harwer was fraudulently joined. *See Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). Where a defendant proves fraudulent joinder, the presence of a resident defendant will not defeat diversity jurisdiction, and a remand on jurisdictional grounds is not required. *Id.* "Fraudulent joinder is a term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). The removing defendant bears the burden of proving that removal is appropriate and is entitled to present facts showing that the joinder is fraudulent. *Id.*

The district court misapplied the fraudulent joinder test. The key inquiry is whether Samanta's complaint put forward any viable theory against Dr. Harwer. Samanta's complaint pleads each element of a cause of action for medical negligence and lack of informed consent against Dr. Harwer. Furthermore, Barr does not offer any argument or facts challenging the viability of these claims. Since Barr did not meet its burden of proving that Dr. Harwer was fraudulently

joined, removal was inappropriate. Accordingly, we vacate the district court's judgment and remand to the district court with instructions that it remand the case to state court for lack of jurisdiction or diversity jurisdiction.

VACATED AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Filed March 22, 2005]
Complaint Filed: 11/13/03

Case No. SAC V04-0253 GLT (ANx)

MEERA SAMANTA, Individually, and as successors in interest to the estate of PARINEETA SAMANTA,
Plaintiff,

vs.

OLINA HARWER, M.D.; BARR LABORATORIES, INC.; and DOES 1 through 100, inclusive,
Defendants.

The Honorable Gary L. Taylor, Judge

JUDGMENT

Defendant Barr Laboratories, Inc. ("Barr") filed its Motion for Summary Judgment on February 18, 2005. Plaintiff filed her Opposition on February 28, 2005. Barr filed its Reply on March 7, 2005. On March 10, 2005, the Honorable Gary L. Taylor, District Judge Presiding, considered all of the briefs, and the evidence presented, if any, of Barr and Plaintiff and issued an order granting Barr's Motion for Summary Judgment.

The evidence presented having been fully considered, the issues having been fully considered and a decision having been duly rendered, IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed

with prejudice on the merits and that Defendant Barr recover its costs.

DATED: March 21, 2005

/s/ GARY L. TAYLOR
THE HONORABLE GARY L. TAYLOR,
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Filed MAR 10, 2005]

Case No. SA CV 04-253-GLT (ANx)

MEERA SAMANTA,

Plaintiff,

vs.

OLINA HARWER *et al.*,

Defendants.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Defendant's motion for summary judgment is GRANTED.

I. BACKGROUND

Plaintiff sued Defendant Barr Laboratories asserting her deceased daughter, Parineeta Samanta, passed away in India from a pulmonary embolism. Plaintiff alleges the pulmonary embolism was caused by an oral contraceptive manufactured by Defendant. Plaintiff brings claims for strict products liability, failure to warn, and negligence.

Defendant now moves for summary judgment on all three claims.

II. DISCUSSION

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under California law,[1] proximate cause is an element of each of Plaintiff's claims. *Thomas v. Lusk*, 27 Cal. App. 4th 1709, 1717 n.3 (Ct. App. 1994); *Powell v. Standard Brands Paint Co.*, 166 Cal. App. 3d 357, 363 (Ct. App. 1985). In a personal injury action, proximate cause "must be proven within a reasonable medical probability based upon competent expert testimony." *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 402-03 (Ct. App. 1985).

Here, the date for designating experts has passed, and Plaintiff has no expert. Without expert testimony, Plaintiff cannot establish proximate cause—an element of each of her claims.

Plaintiff has the burden to present evidence showing an adequate causal connection. Plaintiff's opposition asserts only conjecture, not evidence. The case cannot proceed based on conjecture.

Plaintiff has had every opportunity to marshal her case. For example, the Court (1) held a status conference to warn Plaintiff of possible dismissal, (Ct.'s Aug. 30, 2004 Order), (2) provided Plaintiff time to bring in an attorney, (Ct.'s Aug. 30, 2004 Order), (3) excused Plaintiff's non-compliance with the Court's Order to participate in discovery, (Ct.'s Aug. 30, 2004 Order), and (4) granted Plaintiff's request to extend discovery, (Ct.'s Nov. 16, 2004 Order). Repeated delays and opportunities have been given to Plaintiff to develop her case.

The Court is very sympathetic about Plaintiff's loss. However, Plaintiff has no proof of causation. Defendant's moving brief is meritorious. The Court GRANTS Defendant's motion for summary judgment.

In an effort to avoid summary judgment, Plaintiff has filed an ex parte application to review the Court's earlier order

---

[1] California law applies in this diversity action.

permitting removal of this case to the federal court. Viewed as a motion for reconsideration of the Court's April 2004, minute order, the application is not timely, and no changed facts or new evidence is shown. The fact that Doctor Harwer may have been involved in an arbitration proceeding with Plaintiff does not mean she is a party to this case. The lack of a triable issue in this case will not be avoided by a remand to state court.

III. DISPOSITION

Defendant's motion for summary judgment is GRANTED. The March 14, 2005, hearing on this matter is ordered off-calendar. Defendant shall submit to the Court a short form of a proposed Judgment.

DATED: March 10, 2005

/s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

[Filed APR 28, 2004]

Case No. SA CV 04-0253 GLT (ANx)
Date: April 23, 2004
Title: *Merra Samanta v. Olina Harwer, M.D., et al.*

PRESENT:

HON. Gary L. Taylor JUDGE

Lisa Bredahl	None Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None Present	None Present

PROCEEDINGS: ORDER VACATING ORDER TO SHOW CAUSE [In Chambers]

On March 18, 2004, the Court ordered Defendant Barr Laboratories to show cause regarding the appropriateness of removal while named Defendant Dr. Olina Harwer remains unserved. On April 16, 2004, Defendant Barr Laboratories filed a response, indicating Plaintiff has never served Defendant Dr. Harwer nor requested a summons for service from the state court or this Court. At this stage, it appears Defendant Dr. Harwer is joined fraudulently and removal is appropriate. *Herzig v. Twentieth-Century Fox Film Corp.*, 129 F.Supp. 845, 848 (S.D. Cal. 1955) ("[W]here it appears that the plaintiff has no intention of serving the resident defen-

dants and attempting to recover judgment against them, the Court is justified in concluding, as a matter of fact, that they were joined in bad faith for the sole purpose of preventing Federal jurisdiction, and that, hence, the joinder is fraudulent.").

The Court's March 18 order to show cause is VACATED. If appropriate at a future time, Plaintiff may make a showing of the good faith joinder of Dr. Harwer.

Initials of Deputy Clerk LB

APPENDIX F

UNITED STATES CODE ANNOTATED

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 85—DISTRICT COURTS; JURISDICTION

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this *title*—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

APPENDIX G

UNITED STATES CODE ANNOTATED

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

APPENDIX H

UNITED STATES CODE ANNOTATED

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

* * * *

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

APPENDIX I

UNITED STATES CODE ANNOTATED

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Filed MAR 4, 2004]

Case No. SACV04-0253 GLT (ANx)

MERRA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,

Plaintiff,

vs.

OLINA HARWER, M.D.; BARR LABORATORIES, INC.; and DOES 1 through 100, inclusive,

Defendants.

NOTICE OF REMOVAL OF CIVIL ACTION TO UNITED STATES DISTRICT COURT UNDER 28 U.S.C. § 1441(b) (DIVERSITY)

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

Defendant Barr Laboratories, Inc., through its attorneys, Drinker Biddle & Reath LLP, hereby removes this action from the Superior Court of the State of California for the County of Orange, Central Justice Center, to the United States District Court for the Central District of California on the following grounds:

1. On November 13, 2003, plaintiff commenced an action in the Superior Court of the State of California for the County of Orange, captioned *Meera Samanta, individually, and as successors in interest to the estate of Parineeta*

Samanta, vs. Olina Harwer, MD., Barr Laboratories, Inc., and Does 1 through 100, Inclusive, Case No. 03CC13673.

2. To the best of its knowledge, information, and belief, Barr Laboratories, Inc. (herein "Barr") first received a copy of the complaint and summons on January 12, 2004. (See Declaration of Siobhan Cullen, counsel for Barr (herein "Cullen Declaration"), attached as Exhibit A, ¶ 2.) Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of the proof of service of the summons and complaint, which constitute the only "process, pleadings, and orders served upon" Barr, is attached hereto as Exhibit B.

3. On February 10, 2004, Barr filed its answer to the complaint (attached hereto as Exhibit C).

4. On March 4, 2004, Barr timely filed this removal, which was within thirty days after receipt of information from which it was first ascertainable that this case was one which was removable, as required by 28 U.S.C. § 1446(b).

5. As detailed below, this is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1332(a), in that the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and it is between citizens of different states. Accordingly, this action may be removed to this Court by Barr pursuant to 28 U.S.C. § 1441(b).

6. According to plaintiff's complaint, decedent Parineeta Samanta was a resident of the State of California.

7. According to plaintiff's complaint, plaintiff Meera Samanta, individually and as successor in interest to the Estate of Parineeta Samanta, is a resident of the State of California. (Complaint, Exhibit B, ¶ 1.)

8. Barr Laboratories, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York.

9. Plaintiff's complaint states that Olina Harwer, M.D. ("Dr. Harwer") is licensed to practice in the State of California and provided care to decedent at her offices in Orange County, California. (Complaint, Exhibit B, ¶ 1.)

10. On February 24, 2004, counsel for Barr checked the docket in the state court action and learned that the plaintiff had not served Dr. Harwer, despite the requirements of Rule 201.7(b) of the California Rules of Court, which provides: "The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the filing of the complaint." *(See* Cullen Declaration, Exhibit A, ¶ 3.)

12. To the best of Barr's knowledge, information and belief, as of this date plaintiff still has not served Dr. Harwer, the only resident of California named as a defendant in plaintiff's complaint. *Id.* at ¶ 4.

13. Plaintiff did not file an application for a court order extending the time to serve a pleading, as provided by the California Rules of Court, Rule 201.7(e), nor is there any other evidence in the docket or elsewhere that plaintiff intends to serve Dr. Harwer. (*See* Cullen Declaration, Exhibit A, ¶ 5.)

14. Further, the court on its own motion has not extended or otherwise modified the California Rules of Court, Rule 201.7 requirement that the complaint must be served on all named defendants and proofs of service on those defendants must be filed within 60 days after the filing of the complaint.

15. In checking the docket of the state court action on or about February 24, 2004, counsel for Barr also learned for the first time that Dr. Harwer has never answered plaintiff's complaint. *Id.*, ¶ 6.

16. Barr Laboratories, Inc., expected service of a responsive pleading by Dr. Harwer on approximately February 13,

which would have been approximately 30 days from the last day on which plaintiff could have timely served Dr. Harwer, plus two days for mailing. Not until February 24, 2004, when counsel for Barr Laboratories, Inc., consulted the state court docket and learned that Dr. Harwer has never filed a responsive pleading, did Barr first ascertain that the case had become removable. It now is evident that Dr. Harwer has never been served, plaintiff does not intend to proceed against her, and she has been joined fraudulently to defeat diversity. Accordingly, this Notice of Removal is timely.

17. Complete diversity exists pursuant to 28 U.S.C. § 1441(b). 28 U.S.C. § 1441(b) provides that an action shall be removable "if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). Therefore, the local defendant exception to removal only applies, as the statute states, to defendants who are "properly joined and served."

18. Dr. Harwer has neither been properly joined, nor has she been served. The local defendant exception is inapplicable, and removal is proper. *See, e.g., McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001) (stating "[w]here there is complete diversity of citizenship, . . . the inclusion of an unserved resident does not defeat removal under 28 U.S.C. § 1441(b)."); *Republic Western Insurance Co. v. International Insurance Co.*, 765 F. Supp. 628, 629 (N.D. Cal. 1991) (stating that in cases where complete diversity exists, "a resident defendant who has not been served may be ignored in determining removability") (quoting 14B C Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3723 at 341 (2d Ed. 1985). *See also* U.S. District Court for the Southern District of California Order Denying Motion to Remand, filed July 23, 2003, in *Haberer v. Metabolife International, Inc.*, Case No. 03CV5424 BTM (AJB), p. 4-5, attached hereto as Exhibit D. *Cf. Preaseau v. Prudential Insurance Co. of America*, 591 F.2d 74 (9th Cir. 1979)

(refusing to permit removal although resident defendant joined in good faith had not been served).

19. The presence of Does 1 through 100 cannot defeat diversity, as 28 U.S.C. § 1441(a) provides: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded." To the best of Barr's knowledge, information and belief, no defendant other than Barr has been served with process. (See Cullen Declaration, Exhibit A, ¶ 7.) Accordingly, Barr is the only defendant in this action and no joinder is necessary in this removal.

20. Plaintiff clearly has no intention of serving Dr. Harwer in this action, but rather has named her as a defendant for the fraudulent purpose of defeating Barr's right to have this case heard in federal court. In her complaint, plaintiff states that she "notified defendant, Olina Harwer, M.D., on or about October 25, 2001, by certified mail of the intent to file suit pursuant to California Code of Civil Procedure § 364." (Complaint, Exhibit B, ¶ 11.) According to the complaint, that notice of plaintiff's intent to sue Dr. Harwer was mailed over two years ago, yet plaintiff has not served Dr. Harwer in this action. Further, plaintiff mailed that notice of her intent to file suit against Dr. Harwer before the date on which Parineeta Samanta allegedly suffered a pulmonary embolism, the event giving rise to this action, and before plaintiff alleges Dr. Harwer prescribed the oral contraceptive allegedly at issue. Plaintiff's naming of Dr. Harwer constitutes fraudulent joinder and, as such, cannot prevent removal.

21. Plaintiff's complaint does not specify the amount of damages sought, but prays for judgment against the defendants for general damages in the form of loss of society and comfort; medical and related expenses and special damages, including but not limited to funeral and burial expenses; prejudgment interest; court costs; and for such other relief the Court deems appropriate. (*See generally,* Complaint, Exhibit B.)

22. Although plaintiff's complaint makes an unspecified demand for damages, it is clear that the amount in controversy exceeds $75,000.00, exclusive of interest and costs. *See, e.g., Sanchez v. Monumental Life Insurance Co.*, 102 F.3d 398, 404 (9th Cir. 1996) (stating "in cases where a plaintiff's state court complaint does not specify a particular amount of damages, the removing defendant bears the burden of establishing, by a preponderance of the evidence, that the amount in controversy exceeds [$75,000]."); *Singer v. State Farm Mutual Automobile Insurance Co.*, 116 F.3d 373, 376 (9th Cir. 1997); *Bosinger v. Phillips Plastics Corp.*, 57 F.Supp.2d 986 (S.D. Cal.1999).

23. Under the "preponderance of the evidence" standard, the defendant must provide evidence establishing that it is "'more likely than not'" that the amount in controversy exceeds the jurisdictional amount. *See Sanchez v. Monumental Life Insurance Co.*, 102 F.3d 398, 404. That standard strikes "[t]he proper balance between a plaintiff's right to choose his forum and a defendant's right to remove without unnecessarily expanding federal diversity jurisdiction." *Id.*

24. Even where a defendant does not meet its burden to prove that it is more likely than not that the amount in controversy exceeds the jurisdictional amount, a district court may "make an independent appraisal of the amount of the claim, or suggest that the defendant is free to do so." *Bosinger v. Phillips Plastic Corp.*, 57 F. Supp. 2d 986, 988.

25. Plaintiff seeks damages for the death of her daughter, allegedly as a result of decedent's suffering a pulmonary embolism due to her use of an oral contraceptive manufactured by Barr Laboratories, Inc., and her successor's loss of society and comfort. Were plaintiff to prove liability and causation, plaintiff's damages likely would exceed $75,000 exclusive of interest and costs.

26. Counsel for Barr attempted to telephone plaintiff on February 24, 2004, to discuss the case and the issue of

damages. However, the telephone number provided by plaintiff on the complaint and summons is no longer valid. (Cullen Declaration, Exhibit A, ¶ 8.)

27. On February 26, 2004, Barr's counsel sent plaintiff a letter requesting that she contact Barr to discuss the case. Plaintiff has not done so. (*See* Cullen Declaration, ¶ 9, and Exhibit 1 thereto.) Nevertheless, given the seriousness of plaintiff's alleged damages, it is unlikely that plaintiff will dispute that the amount in controversy exceeds $75,000.

28. All prerequisites for removal have been satisfied. Barr filed this Notice of Removal within 30 days of having first ascertained that this case is removable. Complete diversity exists as to the properly joined and served parties; and, as set forth above, the amount in controversy exceeds Seventy-Five Thousand Dollars ($75,000.00), exclusive of interest and costs.

29. If any question arises as to the propriety of the removal of this action, Barr requests the opportunity to present a supplemental brief, limited discovery, and/or oral arguments in support of its position that this case is properly removed.

WHEREFORE, defendant Barr Laboratories, Inc., hereby removes the above-entitled action, now pending in the Superior Court of the State of California for the County of Orange, to this Court pursuant to 28 U.S.C. § 1441(b), and prays that the Clerk of the Superior Court of the State of California for the County of Orange accept no further pleadings in this cause initiated by plaintiff.

DATED: March 4, 2004 DRINKER BIDDLE & REATH LLP

By: /s/ Siolhan A. Cullen
DONALD F. ZIMMER, JR.
SIOBHAN A. CULLEN
Attorneys for Defendant
BARR LABORATORIES, INC.

EXHIBIT A

DECLARATION OF SIOBHAN A. CULLEN

I, SIOBHAN A. CULLEN declare as follows:

1. I am an attorney at the law firm of Drinker Biddle & Reath LLP, counsel of record for defendant Barr Laboratories, Inc. in this action. I am a member in good standing of the State Bar of California. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. To the best of its information and belief, Barr first received a copy of the complaint and summons at its offices in Pomona, New York on January 12, 2004.

3. On February 24, 2004, I checked the docket in the state court action and learned that the in pro per plaintiff had not served Dr. Harwer, despite the requirements of Rule 201.7(b) of the California Rules of Court.

4. To the best of my information and belief, as of this date plaintiff still has not served or filed a proof of service on Dr. Harwer, the only resident of California named as a defendant in plaintiffs complaint.

5. Plaintiff did not file an application for a court order extending the time to serve a pleading, as provided by the California Rules of Court, Rule 201.7(e), nor is there any other evidence in the docket or elsewhere that plaintiff intends to serve Dr. Harwer.

6. When checking the docket of the state court action on or about February 24, 2004, I also learned for the first time that Dr. Harwer has never answered plaintiffs complaint.

7. To the best of my information and belief, no defendant other than Barr has been served with process in this action.

8. With Karen L. Imbus of Ulmer & Berne LLP, of counsel in this action, I attempted to telephone plaintiff on February 24, 2004, to discuss the case and the issue of damages. However, the telephone number provided by plaintiff on the complaint and summons is no longer valid.

9. On February 26, 2004, Ms. Imbus sent plaintiff a letter requesting that she contact her to discuss the case. Exhibit I attached to this Declaration is a true and correct copy of the letter Ms. Imbus sent to plaintiff on February 25, 2004.

10. Plaintiff has not contacted Barr's counsel with a telephone number at which she can be reached. Therefore, we have been unable to discuss the case and the issue of damages with plaintiff. Nevertheless, given the seriousness of plaintiff's alleged damages, it is unlikely that she will dispute the fact that the amount in controversy exceeds $75,000.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 4, 2004, at Los Angeles, California.

/s/ Siobhan A. Cullen
SIOBHAN A. CULLEN

EXHIBIT 1

ulmer | berne | llp
ATTORNEYS

KAREN L. IMBUS

direct 513.698.5046
direct fax 513.698.5065
kimbus@ulmer.com

February 26, 2004

Ms. Meera Samanta
24916 Sea Crest Drive
Dana Point, CA 92629

Re: *Meera Samanta v. Olina Harwer, M.D., Barr Laboratories, Inc., and Does 1-100* Case No. 03CC13673

Dear Ms. Samanta:

Joseph P. Thomas and I represent Barr Laboratories, Inc., a defendant in the above-captioned lawsuit. In addition, Siobhan Cullen and Donald Zimmer of Drinker, Biddle and Reath LLP are serving as local counsel for our client in this case. I am contacting you directly because I understand that you are representing yourself in this matter. If you retain a lawyer, please let us know, and we will communicate directly with your attorney.

Rule 212 of the California Rules of Court requires that we confer before the case management conference. A copy of Rule 212 is enclosed. As the first case management conference is scheduled for March 23, Siobhan Cullen and I attempted to contact you yesterday at (949) 248-3177, the telephone number listed on the Summons and Complaint. However, we were informed by the telephone company that (949) 248-3177 is no longer a valid telephone number. We would appreciate, therefore, if you would provide us with a new telephone number at which you can be reached.

In addition, so that we can proceed with our factual investigation of this case, we ask that you execute the following enclosed authorization forms:

1. An authorization form for the release of Parineeta Samanta's medical, pharmacy, and insurance information to be released from Olina Ellen Harwer, M.D.
2. An authorization form for the release of Parineeta Samanta'a medical, pharmacy, and insurance information, with the name of the provider from whom the information is to be released, left blank. We will fill in the name of the medical, pharmacy, and insurance providers whose identities we learn during the course of discovery.
3. An authorization to release educational information for Parineeta Samanta.
4. An authorization to release employment information for Parineeta Samanta.

Please also provide Parineeta Samanta's social security number on the forms. When you have completed and signed the authorization forms, please return them to my attention at the offices of Ulmer & Berne LLP, 600 Vine Street, Suite 2800, Cincinnati, Ohio 45202-2409.

Thank you for your attention to these matters. We hope to speak with you in the near future, and most certainly before the case management conference.

Very truly yours,

/s/ Karen L. Imbus
KAREN L. IMBUS
Attorney for Defendant Barr Laboratories, Inc.

KLI/jgv
Enclosures

cc: Siobhan Cullen, Esq. (via e-mail)

BEST AVAILABLE COPY

EXHIBIT B

SUMMONS
(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT: *(Aviso a Acusado)*
OLINA HARWER, M.D., BARR LABORATORIES, INC., and DOES 1 through 100, Inclusive,

YOU ARE BEING SUED BY PLAINTIFF:
(A Ud. le está demandando)
MERRA SAMANTA, individually, and as successors in interest to the estate of PARINDETA SAMANTA

You have 30 CALENDAR DAYS after this summons is served on you to file a typewritten response at this court.

A letter or phone call will not protect you; your typewritten response must be in proper legal form if you want the court to hear your case.

If you do not file your response on time, you may lose the case, and your wages, money and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

Después de que le entreguen esta citación judicial usted tiene un plazo de 30 DIAS CALENDARIOS para presentar una respuesta escrita a máquina en esta corte.

Una carta o una llamada telefónica no le ofrecerá protección; su respuesta escrita a máquina tiene que cumplir con las formalidades legales apropiadas si usted quiere que la corte escuche su caso.

Si usted no presenta su respuesta a tiempo, puede perder el caso, y le pueden quitar su salario, su dinero y otras cosas de su propiedad sin aviso adicional por parte de la corte.

Existen otros requisitos legales. Puede que usted quiera llamar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados o a una oficina de ayuda legal (vea el directorio telefónico).

The name and address of the court is: *(El nombre y dirección de la corte es)*
SUPERIOR COURT OF THE STATE OF CALIFORNIA
700 Civic Center Drive West
P.O. Box 1994
Santa Ana, California 92702
CENTRAL JUSTICE CENTER

CASE NUMBER (Número del Caso)
03CC13673
JUDGE DEREK G. JOHNSON
DEPT. C7

The name, address, and telephone number of ~~PLAINTIFF~~ attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es)
Meera Samanta (949) 248 3177
24916 Sea Crest Drive
Dana Point, CA 92629

DATE: *(Fecha)* NOV 13 2003 ALAN SLATER Clerk, by *(Actuario)* ANGELA KNOX, Deputy *(Delegado)*

SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify)*:
3. ☐ on behalf of *(specify)*:
under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (individual)
☐ other:
4. ☐ by personal delivery on *(date)*:

Form Adopted by Rule 982
Judicial Council of California
SUM-100 (Rev. January 1, 1991)

(See reverse for Proof of Service)
SUMMONS

Legal Solutions Plus

CCP 412.20

PROOF OF SERVICE - SUMMONS

(Use separate proof of service for each person served)

I served the

a. ☐ summons ☐ complaint ☐ amended summons ☐ amended complaint
☐ completed and blank Case Questionnaires ☐ Other *(specify)*:

b. on defendant *(name)*:

c. by serving ☐ defendant ☐ other *(name and title or relationship to person served)*:

d. ☐ by delivery ☐ at home ☐ at business
(1) date:
(2) time:
(3) address:

e. ☐ by mailing
(1) date:
(2) place:

2. Manner of service *(check proper box)*:

a. ☐ **Personal service.** By personally delivering copies. (CCP 415.10)

b. ☐ **Substituted service on corporation, unincorporated association (including partnership), or public entity.** By leaving, during usual office hours copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(a))

c. ☐ **Substituted service on natural person, minor, conservatee, or candidate.** By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) *(Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)*

d. ☐ **Mail and acknowledgment service.** By mailing (by first-class mail or airmail, postage prepaid) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) *(Attach completed acknowledgment of receipt.)*

e. ☐ **Certified or registered mail service.** By mailing to an address outside California (by first-class mail, postage prepaid, requiring a return receipt) copies to the person served. (CCP 415.40) *(Attach signed return receipt or other evidence of actual delivery to the person served.)*

f. ☐ Other *(specify code section)*:
☐ additional page is attached.

3. The "Notice to the Person Served" (on the summons) was completed as follows (CCP 412.30, 415.10, and 474):

a. ☐ as an individual defendant.

b. ☐ as the person sued under the fictitious name of *(specify)*:

c. ☐ on behalf of *(specify)*:
under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor) ☐ other:
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (individual)

d. ☐ by personal delivery on *(date)*:

4. At the time of service I was at least 18 years of age and not a party to this action.

5. Fee for service: $

6. Person serving:

a. ☐ California sheriff, marshal, or constable.

b. ☐ Registered California process server.

c. ☐ Employee or independent contractor of a registered California process server.

d. ☐ Not a registered California process server.

e. ☐ Exempt from registration under Bus. & Prof. Code 22350(b).

f. Name, address and telephone number and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

(For California sheriff, marshal, or constable use only)
I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

ATTORNEY OR PARTY WITHOUT ATTORNEY:
Meera Samanta
Meera Samanta
24916 Sea Crest Drive
Dana Point, CA 92629

TELEPHONE NO.: (949) 248 3177 FAX NO.:
ATTORNEY FOR (Name): IN PRO PER

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
STREET ADDRESS: 700 Civic Center Drive West
MAILING ADDRESS: P.O. Box 1994
CITY AND ZIP CODE: Santa Ana, California 92702
BRANCH NAME: CENTRAL JUSTICE CENTER

CASE NAME: MEERA SAMANTA, V. OLINA HARWER, M.D., et al.

CIVIL CASE COVER SHEET	Complex Case Designation	CASE NUMBER:
[X] Unlimited (Amount demanded exceeds $25,000) [ ] Limited (Amount demanded is $25,000 or less)	[ ] Counter [ ] Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 1811)	JUDGE: DEPT:

All five (5) items below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort
- [ ] Auto (22)
- [ ] Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- [ ] Asbestos (04)
- [ ] Product liability (24)
- [ ] Medical malpractice (45)
- [X] Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort
- [ ] Business tort/unfair business practice (07)
- [ ] Civil rights (08)
- [ ] Defamation (13)
- [ ] Fraud (16)
- [ ] Intellectual property (19)
- [ ] Professional negligence (25)
- [ ] Other non-PI/PD/WD tort (35)

Employment
- [ ] Wrongful termination (36)
- [ ] Other employment (15)

Contract
- [ ] Breach of contract/warranty (06)
- [ ] Collections (09)
- [ ] Insurance coverage (18)
- [ ] Other contract (37)

Real Property
- [ ] Eminent domain/inverse condemnation (14)
- [ ] Wrongful eviction (33)
- [ ] Other real property (26)

Unlawful Detainer
- [ ] Commercial (31)
- [ ] Residential (32)
- [ ] Drugs (38)

Judicial Review
- [ ] Asset forfeiture (05)
- [ ] Petition re: arbitration award (11)
- [ ] Writ of mandate (02)
- [ ] Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 1800–1812)
- [ ] Antitrust/Trade regulation (03)
- [ ] Construction defect (10)
- [ ] Mass tort (40)
- [ ] Securities litigation (28)
- [ ] Environmental/Toxic tort (30)
- [ ] Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment
- [ ] Enforcement of judgment (20)

Miscellaneous Civil Complaint
- [ ] RICO (27)
- [ ] Other complaint (not specified above) (42)

Miscellaneous Civil Petition
- [ ] Partnership and corporate governance (21)
- [ ] Other petition (not specified above) (43)

2. This case [ ] is [X] is not complex under rule 1800 of the California Rules of Court. If case is complex, mark the factors requiring exceptional judicial management:
   a. [ ] Large number of separately represented parties
   b. [ ] Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
   c. [ ] Substantial amount of documentary evidence
   d. [ ] Large number of witnesses
   e. [ ] Coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court
   f. [ ] Substantial post-judgment judicial supervision
3. Type of remedies sought (check all that apply):
   a. [X] monetary b. [ ] nonmonetary; declaratory or injunctive relief c. [ ] punitive
4. Number of causes of action (specify):
5. This case [ ] is [X] is not a class action suit.

Date:

Meera Samanta
(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate, Family, or Welfare and Institutions Code). (Cal. Rules of Court, rule 201.8.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 1800 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a complex case, this cover sheet shall be used for statistical purposes only.

Form Adopted for Mandatory Use
Judicial Council of California
CIVIL CASE COVER SHEET
Legal Solutions Plus
Cal. Rules of Court, rules 201.8, 1800–1812
Standards of Judicial Administration, § 19

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers

If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must check all five items on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. You do not need to submit a cover sheet with amended papers. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 201.8(c) and 227 of the California Rules of Court.

To Parties in Complex Cases

In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 1800 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort
- Auto (22)—Personal Injury/Property Damage/Wrongful Death
- Uninsured Motorist (46) *(if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)*

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- Asbestos (04)
  - Asbestos Property Damage
  - Asbestos Personal Injury/Wrongful Death
- Product Liability *(not asbestos or toxic/environmental)* (24)
- Medical Malpractice (45)
  - Medical Malpractice—Physicians & Surgeons
  - Other Professional Health Care Malpractice
- Other PI/PD/WD (23)
  - Premises Liability (e.g., slip and fall)
  - Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
  - Intentional Infliction of Emotional Distress
  - Negligent Infliction of Emotional Distress
  - Other PI/PD/WD

Non-PI/PD/WD (Other) Tort
- Business Tort/Unfair Business Practice (07)
- Civil Rights (e.g., discrimination, false arrest) *(not civil harassment)* (08)
- Defamation (e.g., slander, libel) (13)
- Fraud (16)
- Intellectual Property (19)
- Professional Negligence (25)
  - Legal Malpractice
  - Other Professional Malpractice *(not medical or legal)*
- Other Non-PI/PD/WD Tort (35)

Employment
- Wrongful Termination (36)
- Other Employment (15)

Contract
- Breach of Contract/Warranty (06)
  - Breach of Rental/Lease Contract *(not unlawful detainer or wrongful eviction)*
  - Contract/Warranty Breach—Seller Plaintiff *(not fraud or negligence)*
  - Negligent Breach of Contract/Warranty
  - Other Breach of Contract/Warranty
- Collections (e.g., money owed, open book accounts) (09)
  - Collection Case—Seller Plaintiff
  - Other Promissory Note/Collections Case
- Insurance Coverage *(not provisionally complex)* (18)
  - Auto Subrogation
  - Other Coverage
- Other Contract (37)
  - Contractual Fraud
  - Other Contract Dispute

Real Property
- Eminent Domain/Inverse Condemnation (14)
- Wrongful Eviction (33)
- Other Real Property (e.g., quiet title) (26)
  - Writ of Possession of Real Property
  - Mortgage Foreclosure
  - Quiet Title
  - Other Real Property *(not eminent domain, landlord/tenant, or foreclosure)*

Unlawful Detainer
- Commercial (31)
- Residential (32)
- Drugs (38) *(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential.)*

Judicial Review
- Asset Forfeiture (05)
- Petition Re: Arbitration Award (11)
- Writ of Mandate (02)
  - Writ—Administrative Mandamus
  - Writ—Mandamus on Limited Court Case Matter
  - Writ—Other Limited Court Case Review
- Other Judicial Review (39)
  - Review of Health Officer Order
  - Notice of Appeal—Labor Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rule 1800-1812)
- Antitrust/Trade Regulation (03)
- Construction Defect (10)
- Claims Involving Mass Tort (40)
- Securities Litigation (28)
- Toxic Tort/Environmental (30)
- Insurance Coverage Claims *(arising from provisionally complex case type listed above)* (41)

Enforcement of Judgment
- Enforcement of Judgment (20)
  - Abstract of Judgment (Out of County)
  - Confession of Judgment *(non-domestic relations)*
  - Sister State Judgment
  - Administrative Agency Award *(not unpaid taxes)*
  - Petition/Certification of Entry of Judgment on Unpaid Tax
  - Other Enforcement of Judgment Case

Miscellaneous Civil Complaint
- RICO (27)
- Other Complaint *(not specified above)* (42)
  - Declaratory Relief Only
  - Injunctive Relief Only *(non-harassment)*
  - Mechanics Lien
  - Other Commercial Complaint Case *(non-tort/non-complex)*
  - Other Civil Complaint (non-tort/non-complex)

Miscellaneous Civil Petition
- Partnership and Corporate Governance (21)
- Other Petition *(not specified above)* (43)
  - Civil Harassment
  - Workplace Violence
  - Elder/Dependent Adult Abuse
  - Election Contest
  - Petition for Name Change
  - Petition for Relief from Late Claim
  - Other Civil Petition

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE—CENTRAL JUSTICE CENTER

[Filed NOV 13, 2003]

CASE NO. 03CC13673

MEERA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA

Plaintiff,

vs.

OLINA HARWER, M.D., BARR LABORATORIES, INC., and DOES 1 through 100 Inclusive,

Defendants.

COMPLAINT FOR COMPENSATORY DAMAGES:

WRONGFUL DEATH AND SURVIVAL ACTION

1. STRICT PRODUCTS LIABILITY
2. FAILURE TO WARN
3. NEGLIGENCE
4. MEDICAL NEGLIGENCE
5. LACK OF INFORMED CONSENT

COMES NOW Plaintiff MEERA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA, in complaint of Defendants, OLINA HARWER, M.D., BARR LABORATORIES, INC., and DOES 1 through, 100, inclusive, as follows:

GENERAL ALLEGATIONS

1. The wrongful death upon which this action is based occurred at Ravi Kiran, 10th Rd, JVPD Scheme, Juhu, Mum-

bai 400 049, India. However, Plaintiff, MEERA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA resides in the County of Orange, State of California; defendant OLINA HARWER, M.D. is licensed to practice medicine in the State of California and provided medical treatment to decedent PARINEETA SAMANTA, at her office in the County of Orange, State of California; and defendant BARR LABORATORIES, INC. has a substantial connection with the County of Orange, State of California through its pharmaceutical sales and has therefore purposefully availed itself of the County of Orange, State of California.

2. Plaintiff, MEERA SAMANTA, was the mother of decedent PARINEETA SAMANTA and is the decedent's successor in interest. Accordingly, Plaintiff MEERA SAMANTA is filing her declaration pursuant to Code of Civil Procedure § 377.32 concurrently herewith.

3 At all times mentioned herein decedent PARINEETA SAMANTA had cerebral palsy and had the mental capacity of about a 7 year old child. Decedent's date of birth is February 5, 1968 and decedent died on November 14, 2002 from a pulmonary embolism proximately and legally caused by the drug Kariva, an oral contraceptive, even though decedent was taking the drug as prescribed.

4. At all relevant times mentioned herein plaintiff, MEERA SAMANTA, was the decedent's legal guardian and made all decisions including but not limited to medical decisions for PARINETTA SAMANTA because of decedent's reduced and impaired mental incapacity.

5. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants DOE 1 through DOE 100 are unknown to plaintiff, who therefore sues said defendants by such fictitious names and will ask leave of the court to amend this complaint to show their true names and capacities when the same are ascertained.

6. Plaintiff is informed and believes, and thereupon alleges, that each Defendant fictitiously named herein as a DOE is legally responsible in some manner for the professional malpractice, negligence, or in some other actionable manner, for the events and happenings hereinafter referred to as well as were tortiously responsible in some manner for legally causing the injuries and damages to Plaintiff as hereinafter alleged, including, but not limited to, tortious liability based upon general negligence, professional negligence, products liability, premises liability, volunteer liability, governmental liability and any other statutory and common law tort liability laws giving rise to third party standing on the part of plaintiff. Plaintiff will seek leave of court to amend this complaint to insert the true names and/or capacities of such fictitiously named Defendants when the same have been ascertained.

7. Plaintiff is informed and believes and on such information and belief allege that defendants, BARR LABORATORIES, INC., and DOES 1 through 50, inclusive, are engaged in the business of manufacturing, compounding, packaging, designing, distributing, testing, constructing, fabricating, analyzing, recommended merchandising, warning, promoting and selling, supplying, marketing, and consulting in the use of, and otherwise placing in the stream of commerce, the prescription drug Kariva, an oral contraceptive—the generic form of the oral contraceptive Mircette.

8. Defendants, OLINA HARWER, M.D., and DOES 51 through 100, inclusive, were physicians, surgeons, or other hospital, medical or allied personnel holding themselves out to be duly licensed to practice medicine, surgery, and related medical services in the County of Orange, State of California, and to possess that degree of skill, ability and expertise, knowledge, qualifications, and learning of similar practitioners in said community.

9. Plaintiff is informed and believes and upon such information and belief alleges that at all times herein mentioned, defendants and DOES, and each of them, were the agents, employees, partners, joint venturers, assistants and/or consultants of the co-defendants and were, as such, acting within the course, scope, purpose and authority of said agency and employment; further, that each and every defendant as aforesaid, when acting as a principal, was negligent in the selection, hiring, and supervision of each and every other defendant agent servant, employee, assistant and/or consultant.

10. Defendants, OLINA HARWER, M.D., BARR LABORATORIES, INC., and DOES 1 through 100, inclusive, each acted in conjunction and accord, and conspired with each other as agents, ostensible agents, employees, servants or representatives of each other in their treatment and representations or the lack of appropriate treatment and representations to decedent, PARINEETA SAMANTA and decedent's mother MEERA SAMANTA.

11. Plaintiff notified Defendant, OLINA HARWER, M.D., on or about October 25, 2001, by certified mail of the intent to file suit pursuant to California *Code of Civil Procedure* § 364.

FIRST CAUSE OF ACTION

STRICT PRODUCTS LIABILITY

(Against BARR LABORATORIES, INC. and DOES 1 through 50, Inclusive)

12. Plaintiff, MEERA SAMANTA, individually, and as successor in interest to the estate of PARINEETA SAMANTA, realleges and incorporates paragraphs 1 through 11, above, as though fully set forth here.

13. At all times relevant herein, Defendants BARR LABORATORIES, INC, and DOES 1 through 50, inclusive, and each of them, were at all times relevant herein, engaged

in the business of manufacturing, compounding, packaging, designing, distributing, testing, constructing, fabricating, analyzing, recommended merchandising, advertising, promoting and selling, supplying, marketing, and consulting in the use of, and otherwise placing in the stream of commerce, the prescription drug Kariva, an oral contraceptive.

14. On or about August 19, 2002, and at times thereafter, decedent, PARINETTA SAMANTA, ingested Kariva as directed and prescribed by a physician defendant, OLINA HARWER, M.D.

15. At all times relevant herein, Kariva was unreasonably unsafe for its intended use and was defective by reason of design, distribution, manufacturing, promotion, testing, and/or lack of adequate warnings.

16. At all times relevant herein, Defendants, BARR LABORATORIES, INC., and DOES 1 through 50, inclusive, and each of them knew or should have known about these defects of Kariva, and failed to warn decedent, PARINETTA SAMANTA, her mother MEERA SAMANTA, her doctors and the general public about those defects at the time they were manufacturing, compounding, packaging, designing, distributing, testing, constructing, fabricating, analyzing, recommending, merchandising, advertising, promoting, selling, supplying, marketing and consulting in the use of, and otherwise placing in the stream of commerce, the prescription drug Kariva.

17. Although decedent's use of Kariva was as directed by a physician and for its intended and foreseeable purposes, said use proximately and legally caused decedent, PARINETTA SAMANTA to suffer and developed a blood clot and resulted in a pulmonary embolism and death.

18. Plaintiff, MEERA SAMANTA, is informed and believes and upon such information and belief alleges that Defendants, BARR LABORATORIES, INC. and DOES 1

through 50, inclusive, and each of them, were aware that Kariva was highly toxic and posed an unreasonable danger of blood clot and pulmonary embolism, muscle weakness and/or damage, and conditions related thereto, to members of the public who took and used Kariva as recommended and prescribed by physicians. Defendants, BARR LABORATORIES, INC., and DOES I through 50, inclusive, and each of them, were aware that Kariva was unreasonably dangerous if taken as prescribed based upon reported cases of such complications over the last several years.

19. As a proximate and legal result of the tortious acts and omissions of the Defendants, and the death of the decedent, PARINETTA SAMANTA, Plaintiff, MEERA SAMANTA has been deprived of the love, affection, society, comfort, support, contributions, and inheritance of the decedent, and the Plaintiff has suffered said damages in an amount currently unknown, but which will be proven at the time of trial and are well in excess of the jurisdiction of this court.

20. As a further proximate and legal result of the tortious acts and omissions of the Defendants, Plaintiff incurred funeral and burial expenses in an amount currently unknown, but which will be proven at the time of trial.

21. As a further proximate and legal result of the tortious acts and/or omissions of the Defendants, Plaintiff was obligated to pay medical expenses which are also currently unknown, but which will also be proven at the time of trial.

SECOND CAUSE OF ACTION

FAILURE TO WARN

(AGAINST BARR LABORATORIES and DOES 1 through 50, Inclusive)

22. Plaintiff incorporates by reference all preceeding paragraphs of this complaint as fully set forth herein.

23. The Kariva manufactured and supplied by Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive, was not accompanied by proper or adequate warnings to physicians, and consumers regarding all possible adverse side effects associated with the use of Baycol and the severity and duration of its adverse side effects.

24. The warnings and information provided by the Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive did not accurately reflect the symptoms, scope and severity of the potential side effects of Kariva.

25. Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive, failed to perform adequate testing and such testing would have shown Defendants that Kariva possessed serious potential adverse health effects about which full and proper warnings accurately describing said dangers should have been made.

26. Defendants' BARR LABORATORIES and DOES 1 through 50, Inclusive, manufacture and sale of Kariva was defective in that it had inadequate warnings or instructions because, after defendants knew or should have known of the serious risks of Kariva's use, defendants failed to provide full and complete warnings adequately identifying said dangers to the consumers of Kariva; instead, Defendants continued to aggressively market and promote Kariva use as safe and effective.

27. Had Defendants provided adequate warnings, plaintiff would not have suffered the damages alleged, and the damages suffered.

28. As a proximate and legal result of the tortious acts and omissions of the Defendants, and the death of the decedent, PARINETTA SAMANTA, Plaintiff, MEERA SAMANTA, has been deprived of the love, affection, society, comfort, support, contributions, and inheritance of the decedent, and the Plaintiff has suffered said damages in an amount currently

unknown, but which will be proven at the time of trial and are well in excess of the jurisdiction of this court.

29. As a further proximate and legal result of the tortious acts and omissions of the Defendants, Plaintiff incurred funeral and burial expenses in an amount currently unknown, but which will be proven at the time of trial.

30. As a further proximate and legal result of the tortious acts and/or omissions of the Defendants. Plaintiff was obligated to pay medical expenses which are also currently unknown, but which will also be proven at the time of trial.

THIRD CAUSE OF ACTION

NEGLIGENCE

(AGAINST BARR LABORATORIES and DOES 1 through 50, Inclusive)

31. Plaintiff incorporates by reference all preceding paragraphs of this complaint as fully set forth herein.

32. Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive, owed a duty to exercise reasonable care to decedent in the design, manufacturer, sale, and/or distribution of Kariva before placing the drug into the stream of commerce including a duty to assure that the product did not cause users to suffer from unreasonably dangerous side effects even though used for its intended purpose of administration and ingestion by consumers as an oral contraceptive.

33. Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive failed to exercise ordinary care and breached their duty to decedent by failing to properly manufacture, inspect, prepare, research, investigate, test, evaluate, analyze, and provide and distribute the Kariva that was purchased and ingested by the decedent.

34. Plaintiff, on information and belief, alleges that Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive were negligent in the design, manufacture, testing and advertising, warning, marketing and sale of Kariva in that: Defendants failed to used due care in the aforementioned steps to avoid the aforementioned risks to individuals when Kariva was prescribed, and failed to accompany their products with proper warnings regarding all possible adverse effects associated with the use of Kariva and the comparative severity and duration of such adverse effects, further the warnings provided with the product failed to properly warn about all possible adverse effects associated with the use of Kariva, together with other pharmaceutical drugs; Defendants also failed to conduct adequate pre-clinical and clinical testing and post-marketing surveillance and follow-up concerning the drug; and failed to warn health care providers and the decedent about the need for follow-up care and medical monitoring when on the drug Kariva, and failed to timely apprize and inform the FDA of the new information concerning adverse effects of the drug; and negligently delayed warning about the drug when they knew, or in the exercise of reasonable care should have known that the drug was unreasonably dangerous to the users; and were otherwise careless and negligent.

35. As a proximate and legal result of the aforementioned negligence of the Defendants, decedent, PARINETTA SAMANTA, suffered death and Plaintiff MEERA SAMANTA has been deprived of the love, affection, society, comfort, support, contributions, and inheritance of the decedent, and the Plaintiff has suffered said damages in an amount currently unknown, but which will be proven at the time of trial and are well in excess of the jurisdiction of this court.

36. As a further proximate and legal result of the tortious acts and omissions of the Defendants, Plaintiff incurred funeral and burial expenses in an amount currently unknown, but which will be proven at the time of trial.

37. As a further proximate and legal result of the tortious acts and/or omissions of the Defendants, Plaintiff was obligated to pay medical expenses which are also currently unknown, but which will also be proven at the time of trial.

FOURTH CAUSE OF ACTION

MEDICAL NEGLIGENCE

(Against OLINA, HARWER, M.D., and DOES 51 through 100, Inclusive)

38. Plaintiff incorporates by reference all preceding paragraphs of this complaint as fully set forth herin.

39. On or about July 22, 2002 and thereafter, plaintiff MEERA SAMANTA, on behalf of decedent, PARINEETA SAMANTA, consulted and engaged for compensation the medical services of the defendants, OLINA HARWER, M.D. and DOES 51 through 100, Inclusive, and each of them, so as to secure and receive appropriate medical treatment as was reasonable and necessary relative to the plaintiff's then existing medical condition, health and well-being, including, but not limited to, performing evaluation, diagnosis and treatment of decedent PARINEETA SAMANTA'S irregular and heavy menstrual periods and a fibroid uterus.

40. Through the rendering of medical care, a physician/patient and/or hospital/patient relationship was formed between decedent, PARINEETA SAMANTA, and said Defendants, OLINA HARWER M.D. and DOES 51 through 100, Inclusive. Pursuant to the aforementioned relationship; Defendants, each of them, undertook said employment for compensation and agreed to render and provide such medical services and otherwise do all things necessary and proper for plaintiffs general health and well-being and to thereafter issue the course of care and treatment.

41. At all times mentioned herein, decedent, PARINEETA SAMANTA, as well as during the course and scope of any

surgical/medical procedures or treatment performed on her person, was under the exclusive control of the defendants at all times mentioned herein.

42. At all times mentioned herein, Defendants, OLINA HARWER, MD. and DOES 51 through 100, Inclusive, each of them, had a duty to comport with the standard of care applicable to healthcare providers under similar circumstances within the medical community.

43. At all times mentioned herein, defendants, OLINA HARWER, M.D. and DOES 51 through 100, Inclusive, negligently failed to possess and exercise that degree of knowledge and skill ordinarily possessed and exercised by the physicians, surgeons, hospital, nurses, attendants, technicians, consultants and the like engaged in said professions in the same or similar locality as defendants, each of them as aforesaid because defendants negligently prescribed an oral contraceptive, which defendant knew or should have known should not have been prescribed to a person with cerebral palsy such as decedent.

44. On or about August 19, 2002, and at times thereafter, Defendants, OLINA HARWER, M.D. and DOES 51 through 100, Inclusive, undertook duties and responsibilities including, but not limited to, properly performing the screening, evaluation, diagnosis, care and treatment for Plaintiff's aforementioned symptoms, as well as the care and treatment for her general health and welfare. Prior to August 19, 2002, Defendants, and each of them, knew or in the exercise of reasonable care should have known that Kariva was known to be dangerous and had been linked to blood clots and pulmonary embolism and death and that the drug was not appropriate for the decedent's use because decedent had cerebral palsy.

45. On or about August 19, 2002, and at times thereafter, Defendants OLINA HARWER, M.D., and DOES 51-100,

Inclusive, were negligent in performing the care and treatment for decedent's aforementioned symptoms, including, but not necessarily limited to, ordering decedent, to take the drug Kariva, which Defendants, OLINA HARWER, M.D., and DOES 51-100, Inclusive, knew or should have known presents unreasonable risk of side-effects and injuries, which include but are not limited to blood clot, pulmonary embolism and death.

46. Said negligence caused serious and needless injuries including, blood clot, pulmonary embolism and death.

47. As physicians, surgeons, or other hospital, medical or allied personnel assisting and/or attending Plaintiff, DOES 51 through 100, inclusive, breached their duty of care to decedent by failing to perform, supervise and/or ensure the proper evaluation, care, and treatment of decedent's condition and injuries, including, but not limited to, the aforementioned procedures, presentation, history and complaints.

48. The Defendants' breaches of duty, as aforementioned, were a substantial factor and legal cause decedent decedent's death because decedent was not a candidate for the oral contraceptive Kariva because decedent suffered from cerebral palsy.

49. As a proximate and legal result of the aforementioned negligence of the Defendants, decedent, PARINEETA SAMANTA, suffered death and Plaintiff, MEERA SAMANTA has been deprived of the love, affection, society, comfort, support, contributions, and inheritance of the decedent, and the Plaintiff has suffered said damages in an amount currently unknown, but which will be proven at the time of trial and an well in excess of the jurisdiction of this court.

50. As a further proximate and legal result of the tortious acts and omissions of the Defendants, Plaintiff incurred funeral and burial expenses in an amount currently unknown, but which will be proven at the time of trial.

51. As a further proximate and legal result of the tortious acts and/or omissions of the Defendants, Plaintiff was obligated to pay medical expenses which are also currently unknown, but which will also be proven at the time of trial.

FIFTH CAUSE OF ACTION

LACK OF INFORMED CONSENT – WRONGFUL DEATH

52. Plaintiff incorporates by reference all preceding paragraphs of this complaint as fully set forth herein.

53. At all times mentioned herein, Defendants, OLINA HARWER, M.D., and DOES 51 through 100, Inclusive, had a duty to disclose to decedent, PARINEETA SAMANTA through her mother and legal guardian MEERA SAMANTA, all known risks of death, serious bodily harm, and possible complications associated with oral contraceptive defendant prescribed. Such undisclosed risks include, but are not limited to the risk of blood clot, pulmonary embolism and death.

54. At all times mentioned herein, Defendants, OLINA HARWER, M.D., and DOES 51 through 100, Inclusive, had a duty to disclose to decedent, PARINEETA SAMANTA through her mother and legal guardian MEERA SAMANTA, any and all additional information that a skilled practitioner in good standing would disclose under the same or similar circumstances.

55. At all times relevant herein, defendant, OLINA HARWER, M.D., and DOES 51 through 100, Inclusive, breached their respective duties to disclose the aforementioned risks.

56. At all times relevant herein, defendants OLNA HARWER, M.D., and DOES 51 through 100, Inclusive, further breached their respective duties to disclose additional information that a skilled practitioner in good standing would provide under the same or similar circumstances. Such breaches include, but are not limited to: a) Defendants' failure to disclose that defendant was prescribing an oral contraceptive;

and b) Defendants' failure to inform decedent, PARINEETA SAMANTA through her mother and legal guardian MEERA SAMANTA, of the risks involved in prescribing said oral contraceptives to a person with cerebral palsy.

57. At all times relevant herein, the decedent PARINEETA SAMANTA through her mother and legal guardian MEERA SAMANTA would have refused the treatments ordered and performed by Defendants, had defendants not breached their respective duties to disclose the aforementioned information.

58. As a proximate and legal result of the conduct of the defendants, and each of them, Plaintiff, suffered the death of her daughter, PARINEETA SAMANTA, thereby suffering great physical and mental pain and suffering all to her general damages in amounts not yet known, but which will be proven at trial.

59. As a further proximate and legal result of the negligence of the defendants, and each of them, plaintiff have suffered medical and related expenses in an amount not yet known. The plaintiff will seek leave of the Court to amend this complaint when said amount is ascertained.

PRAYER

WHEREFORE, Plaintiff, MEERA SAMANTA, individually, and as successor in interest to the estate of PARINETTA SAMANTA, rightfully prays for judgment against Defendants as follows:

FIRST CAUSE OF ACTION

PRODUCTS LIABILITY

1. General damages in the form of loss of comfort and society;

2. Medical and related expenses and special damages incurred, including but not limited to funeral and burial expenses in such sums as may be proved at trial;
3. Prejudgment interest as indicated;
4. Cost of suit herein;
5. For such other and further relief as the court may deem proper.

SECOND CAUSE OF ACTION

FAILURE TO WARN

1. General damages in the form of loss of comfort and society;
2. Medical and related expenses and special damages incurred, including but not limited to funeral and burial expenses in such sums as may be proved at trial;
3. Prejudgment interest as indicated;
4. Cost of suit herein;
5. For such other and further relief as the court may deem proper.

THIRD CAUSE OF ACTION

NEGLIGENCE

1. General damages in the form of loss of comfort and society;
2. Medical and related expenses and special damages incurred, including but not limited to funeral and burial expenses in such sums as may be proved at trial;
3. Prejudgment interest as indicated;
4. Cost of suit herein;
5. For such other and further relief as the court may deem proper.

FOURTH CAUSE OF ACTION

MEDICAL NEGLIGENCE

1. General damages in the form of loss of comfort and society;
2. Medical and related expenses and special damages incurred, including but not limited to funeral and burial expenses in such sums as may be proved at trial;
3. Prejudgment interest as indicated;
4. Cost of suit herein;
5. For such other and further relief as the court may deem proper.

FIFTH CAUSE OF ACTION

LACK OF INFORMED CONSENT

1. General damages in the form of loss of comfort and society;
2. Medical and related expenses and special damages incurred, including but not limited to funeral and burial expenses in such sums as may be proved at trial;
3. Prejudgment interest as indicated;
4. Cost of suit herein;
5. For such other and further relief as the court may deem proper.

DATED:October_____2003

BY: _____

MEERA SAMANTA, individually, and as successor in interest to the estate of PARINEETA SAMANTA
In Pro Per

DECLARATION OF MEERA SAMANTA
PURSUANT TO C.C.P. §§ 377.30, 377.32

I, MEERA SAMANTA, DO DECLARE AS FOLLOWS:

1. PARINEETA SAMANTA was born on February 5, 1968 and died on November 14, 2002. Her place of death was Ravi Kiran; 10th Rd, JVPD Scheme, Juhu, Mumbai 400 049, India. A certified copy of her Death Certificate is attached hereto, incorporated by reference herein and filed concurrently herewith.

2. No proceedings are now pending in California or any other state for the administration of decedent's estate nor do I presently intend on personally initiating any such proceedings.

3. I, MEERA SAMANTA, am Decedent PARINEETA SAMANTA's successor in interest as defined in C.C.P § 377.11 of the California Code of Civil Procedure and succeed to the Decedent's interest in the action or proceedings herein.

4. I have become the decedent, PARINEETA SAMANTA's successor in interest by virtue of the fact that I am her mother. I am the lawful beneficiary of the decedent in the pending action or proceeding.

5. No other person has a superior right to commence the action proceedings herein or to be substituted for the decedent in the pending action or proceeding.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

DATED: _____

_____
MEERA SAMANTA
Successor in interest & Mother of
Decedent, PARINEETA SAMANTA

EXHIBIT C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

CASE NO.: 03CC13673

MEERA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,
Plaintiff,

vs.

OLINA HARWER, M.D., BARR LABORATORIES, INC., AND DOES 1 THROUGH 100, INCLUSIVE
Defendants.

Complaint Filed: November 13, 2003
Trial Date: None
Judge Derek G. Johnson

ANSWER OF BARR LABORATORIES, INC.

Defendant, Barr Laboratories, Inc. (herein "defendant") answers plaintiff's unverified complaint as follows:

Under the provisions of *Code of Civil Procedure* § 431.30(d), defendant denies each and every allegation of the complaint and the whole complaint, and further denies that plaintiff and/or her decedent were damaged in the sum alleged or any other sum whatsoever. Defendant further denies that plaintiff's and/or her decedent's alleged injuries resulted from or were in any way connected with any product, act, omission, fault, conduct, or liability on the part of defendant whether negligent, careless, unlawful, or of any nature, alleged or otherwise, and denies that defendant was in any

way negligent, careless, reckless, wanton, or unlawful, or that any product manufactured by defendant was defective or unreasonably dangerous.

FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE

The complaint fails to state facts sufficient to constitute a cause of action against defendant.

FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff's and/or her decedent's alleged injuries, damages and/or losses were proximately caused by the negligence and/or fault of plaintiff and/or her decedent and/or individuals or entities other than defendant, and this comparatively reduces the percentage of any negligence and/or fault attributable to defendant.

FOR A THIRD SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff has produced no evidence that plaintiff's decedent used a product manufactured by Barr Laboratories, Inc.

FOR A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE

In the event it is established that plaintiff used Kariva, plaintiff and/or her decedent had full knowledge of, accepted, and assumed all risks and possible adverse effects related to the use of Kariva. Plaintiff's recovery, therefore, is barred, diminished, reduced, or offset under the principles of assumption of the risk and/or informed consent.

FOR A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE

If the plaintiff and/or her decedent suffered or sustained any injury, loss, or damage as a result of the alleged incident referred to in plaintiff's complaint, the injury, loss, or damage

was a direct result of plaintiff's and/or her decedent's failure to follow the reasonable advice of decedent's healthcare providers.

FOR A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff cannot recover from defendant because her injuries and damages and/or the injuries and damages of her decedent, if any, were caused by plaintiff and or her decedent's misuse, abuse, and/or alteration of Kariva or other products allegedly at issue in this litigation.

FOR A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE

The warnings and admonitions disseminated to the relevant medical community about Kariva adequately reflected the risks that were known, or scientifically knowable, at the time that plaintiff's decedent allegedly ingested Kariva. Plaintiff's decedent's physicians acted as "learned intermediaries" in determining that Kariva's benefits outweighed the known risks and in relating the nature and extent of those risks to plaintiff and/or her decedent. Therefore, defendant is not liable to plaintiff.

FOR AN EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant or its agents, representatives, and employees gave adequate warnings, instructions, notices, and directions to all individuals involved regarding the care, operation, use, and maintenance of the product allegedly at issue, including all proper safety measures, precautions, and procedures.

FOR A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE

If the plaintiff and/or her decedent suffered or sustained any injury, loss, or damage as a result of the alleged incident referred to in plaintiff's complaint, any such injury, loss, or

damage was a direct result of the course of the pre-existing condition with which the plaintiff's decedent was afflicted, and the care, or lack thereof, attendant to that condition.

FOR A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE

The causes of action alleged in the complaint are pre-empted by the federal statutes and regulations that regulate Kariva, including but not limited to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 300 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*

FOR AN ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE

At no time was Kariva defective or unreasonably dangerous.

FOR A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant's liability, if any, for non-economic damages is several rather than joint, and should be prorated according to Civil Code § 1431.2. Defendant shall be liable only for the amount of non-economic damages, if any, allocated to it in direct proportion to its percentage of fault, if any.

FOR A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant is entitled to contribution from any person and/or entity whose negligence or other fault contributed to plaintiff's and/or her decedent's alleged injuries and damages if plaintiff should receive a verdict against defendant.

FOR A FOURTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

The benefits of the design of Kariva outweigh the risk of danger, if any, inherent in the design, in light of all relevant factors.

FOR A FIFTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering from defendant because independent, intervening, and/or superseding forces and/or actions of others caused or contributed to plaintiff's and/or her decedent's alleged losses and/or damages.

FOR A SIXTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff and/or her decedent failed to mitigate their damages, if any, despite full knowledge of them.

FOR A SEVENTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant's liability, if any, will not result from its own conduct, but instead, will derive solely from an obligation imposed by law. As such, defendant is entitled to complete and total express and/or implied indemnity from other defendant(s) and/or others not yet party to this action.

FOR AN EIGHTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

The complaint is subject to the limitations on the doctrine of product liability for a purported design defect and breach of warranty as set forth in the Restatement Second of Torts, Section 402A, comment k, and the decisions in *Brown v. Superior Court* (1988) 33 Cal.3d 1049; *Hufft v. Horowitz* (1992) 4 Cal.App.4th 8; and *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349.

FOR A NINTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiffs claims are barred by Sections 6(c) and (d) of the Restatement Third of Torts. Reasonable physicians knowing of the reasonably foreseeable risks and therapeutic benefits associated with Kariva would have prescribed and did pre-

scribe Kariva for classes of patients, and reasonable instructions and warnings regarding Kariva were provided to prescribing physicians.

FOR A TWENTIETH, SEPARATE AND AFFIRMATIVE DEFENSE

The complaint, and each of its causes of action, is barred by the applicable statute of limitations, including, without limitation, *Code of Civil Procedure* sections 335.1, 337, 338, 339, 340, and 343.

FOR A TWENTY-FIRST, SEPARATE AND AFFIRMATIVE DEFENSE

To the extent plaintiff's and/or her decedent's injuries and damages, if any, were related to Kariva, they were due to plaintiff's decedent's idiosyncratic reaction to Kariva for which defendant cannot be held responsible.

FOR A TWENTY-SECOND, SEPARATE AND AFFIRMATIVE DEFENSE

The design, manufacture, and distribution of Kariva complied with all applicable industry and governmental standards and regulations, and reflected the current state of the art at the time Kariva was designed, manufactured, sold, and distributed. Consequently, there can be no liability imposed against defendant.

FOR A TWENTY-THIRD, SEPARATE AND AFFIRMATIVE DEFENSE

If Kariva was involved in the alleged incident described in plaintiff's complaint, then, and in that event, Kariva was not defective in manufacture at the time of the manufacture and, therefore, the defendant is not liable.

FOR A TWENTY-FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE

Kariva has certain unavoidable, inherent characteristics which could not and cannot be obviated under the state of scientific knowledge at the time it was designed, tested, manufactured, labeled, and distributed to plaintiff and/or her decedent. If plaintiff and/or her decedent were injured and/or damaged as a result of the decedent's use of Kariva, those injuries or damages were the result of certain inherent characteristics associated with Kariva that could not be avoided without compromising the efficacy of Kariva.

FOR A TWENTY-FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff's complaint is equitably barred because plaintiff's failure to join all indispensable parties precludes the Court from granting complete relief to those who are parties to the action and will result in prejudice to defendant in future litigation.

FOR A TWENTY-SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff's complaint is precluded by actions and determinations of federal and state regulatory agencies, including without limitation, the Federal Food and Drug Administration.

FOR A TWENTY-SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE

If Kariva was involved in the incident alleged in plaintiff's complaint, then it modified, altered, misused, and abused by someone other than defendant prior to or at the time of the alleged use by plaintiffs decedent. Such modification, alteration, misuse, and/or abuse of Kariva was the sole legal cause of plaintiff's and/or her decedent's injuries and damages, if any.

FOR A TWENTY-EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE

To the extent that the facts and evidence learned through the investigation may warrant, plaintiff's claims are barred, reduced, and/or limited to applicable statutory and common law regarding limitations of awards, caps on recovery, and set-offs.

FOR A TWENTY-NINTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff's complaint should be dismissed for lack of standing.

FOR A THIRTIETH, SEPARATE AND AFFIRMATIVE DEFENSE

Venue may not be proper in this action.

FOR A THIRTY-FIRST, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff's complaint should be dismissed pursuant to the doctrine of forum non conveniens.

FOR A THIRTY-SECOND, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant asserts and does not waive any and all equitable and legal defenses, including but not limited to the doctrines of laches, res judicata, collateral estoppel, or unclean hands.

FOR A THIRTY-THIRD, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant reserves the right to assert additional affirmative defenses as they became known during the course of this litigation, including without limitation any defenses raised by any other party.

WHEREFORE defendant Barr Laboratories, Inc. prays:

1. That plaintiff take nothing by her complaint;
2. That plaintiff's award, if any, be apportioned among all individuals or entities whose conduct contributed to the claimed injuries and damages;
3. For the costs of suit incurred herein;
4. For reasonable attorneys' fees; and
5. For such other and further relief as this court deems just and proper.

Dated: February 9, 2004

DRINKER BIDDLE & REATH LLP
/s/ Siobhan A. Cullen
Donald F. Zimmer, Jr.
Siobhan A. Cullen
Attorneys for Defendant
Barr Laboratories, Inc.

Of Counsel:

Joseph Thomas
Karen L. Imbus
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202
Telephone: (513) 698-5046
Facsimile: (513) 698-5047

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 03CV524 BTM (AJB)

SONJA HABERER, an individual and
CHAD HABERER, an individual,
Plaintiffs,

vs.

METABOLIFE INTERNATIONAL INC., a corporation;
METABOLIFE INTERNATIONAL LLC, a company;
GLOBAL METABOLIFE 356 LLC, a company;
WALMART STORES CORPORATION, a corporation, *et al.*,
Defendants.

ORDER DENYING MOTION TO REMAND

I. INTRODUCTION

Sonja Haberer ("Haberer") purchased a dietary supplement called Metabolife from a Wal-Mart store. On October 24, 2001, Haberer suffered a seizure allegedly after ingesting Metabolife. Haberer claims that Metabolife caused the seizure because it contains Ephedrine, an amphetamine-like stimulant that can have dangerous effects on the nervous system and the heart.

On February 27, 2003, Haberer filed a complaint in the Superior Court of California, County of San Diego, which named as defendants Metabolife International, Inc., the manufacturer and marketer of the product, other Metabolife-related

entities and individuals, and Wal-Mart as the retailer. Haberer is a resident of Texas. Metabolife is a California corporation with its principal place of business in San Diego, California. Wal-Mart is a Delaware corporation with its principal place of business in Arkansas. Both Metabolife and Wal-Mart conduct business across the country and extensively in California and the County of San Diego.

On March 17, 2003, prior to being formally served, Wal-Mart made a general appearance in the Superior Court by filing an answer. Concurrently, Wal-Mart filed a petition to remove the action to federal court. In its Petition, Wal-Mart stated that it waived service and was effecting removal based on this Court's diversity jurisdiction pursuant to 28 U.S.C. §§ 1441 and 1332. On April 17, 2003, Plaintiffs filed the instant motion to remand the action to state court. The party invoking the removal jurisdiction of federal courts, however, bears the burden of establishing federal jurisdiction over the state court suit. *See, Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). For the following reasons, the Court finds that Wal-Mart has met its burden and remand is inappropriate.

II. DISCUSSION

It is uncontested that complete diversity exists among the parties and that the amount in controversy exceeds $75,000. Plaintiffs contend, however, that removal was improper for several reasons: (1) it was premature because Plaintiffs' time to serve Defendants had not expired, (2) it was untimely since the period for removal only begins after a defendant is served, and (3) it circumvents the local defendant exception to the removal statute.

Plaintiffs' first theory, that removal was premature because their time to serve Defendants had yet to expire, is both novel and unpersuasive. *See*, Motion at 5 (stating that under San Diego Superior Court Local Rule 2.5, a plaintiff has 60 days

from the date the complaint is filed to formally serve the defendants). It is telling that Plaintiffs are unable to cite to any case authority that supports this proposition. Although caselaw cited for this motion by both parties is replete with instances where one defendant removed the case prior to the expiration of the time for service and in situations where other defendants had yet to be served, see discussion *infra*, none of these courts ever mentioned the possibility that a removal could be premature because the time to serve had not yet expired. In short, the Court finds this argument for remanding the action wholly unpersuasive.

Plaintiffs' second theory is that Defendant's removal was untimely because the statutory period for removal had not yet begun. According to Plaintiffs, "the removal period is triggered *only* when the defendant is properly served with a summons and complaint and thus subject to a court's jurisiction." Motion at 6-7. Plaintiffs' citation to Supreme Court precedent, however, is misleadingly selective. The Court in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999), did state that "if the complaint is filed in court prior to any service, the removal period runs from the service of the summons." This statement, however, was based on the principle that a court generally does not have jurisdiction over a party until that party is properly served. Therefore, in a case where a defendant has voluntarily subjected itself to the court's jurisdiction prior to formal service, such as this one, the aforementioned statement in *Murphy Brothers* does not apply. As the Supreme Court explained in that same opinion:

> in the absence of such service (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant . . . . Unless a named defendant agrees to waive service, the summons continues to function as the *sina qua non* di-

> recting an individual or entity to participate in a civil action . . . .

Murphy Brothers at 350.

In this case it is uncontested that Defendant Wal-Mart waived service and subjected itself to the state court's jurisdiction by making a general appearance and filing an answer. Therefore, Plaintiffs' reliance on *Murphy Brothers* is inapposite.

The real question is whether Wal-Mart's general appearance constituted "service" so as to trigger the beginning of the removal period. According to 28 U.S.C. § 1446(b), the "notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief . . . ." In determining whether a general appearance constitutes "service" under the federal removal statute, the Court is required to look to state law. *See, Davis v. Cash*, 2001 WL 1149355, *2 (N.D. Texas) (stating that in diversity cases, courts "must look to state law in determining whether service is valid for removal purposes"). In *Davis*, the court found that under the Texas Rules of Civil Procedure an answer constituted an appearance of the defendant so as to dispense with the necessity of service upon him. *Id.*

Under the California Code of Civil Procedure a "general appearance by a party is equivalent to personal service of summons on such party." Cal. Civ. P. § 410.50. Accordingly, this Court finds that Wal-Mart's general appearance in state court was sufficient to constitute "service" under the federal removal statute and begin the running of the 30-day period for it to effect removal. Therefore, Defendant's removal was not untimely.

Plaintiffs' final argument is that removal was improper because it was a conscious attempt to evade the "no local

defendant" exception to removal. Under 28 U.S.C. § 1441(b), such an action "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Defendant contends that removal was proper because the local defendant exception only applies, as the statute states, to defendants who are "properly joined and served." Accordingly, since the local defendant, Metabolife, Inc., was never served, the exception is simply not applicable.

Plaintiffs contend that in deciding whether to grant a motion to remand, courts have the discretion to consider unserved local defendants. In *Tarter v. United States Fidelity & Guaranty Co.*, 1992 U.S. Dist. LEXIS 18865, *5 (N.D. Cal.), the court stated that while "a resident defendant who has not been served 'may' be ignored in determining removability, no cases have held that remand 'must' be defeated because of lack of service at the time the removal petition is filed." Although the court in *Tater* did consider the domicile of the unserved local defendant in determining to remand the case to state court, Plaintiffs have cited no other case where a district court has similarly exercised this sort of "discretion."

In fact the vast majority of courts that have dealt with this specific issue have decided not to consider the domicile of an unserved local defendant in determining whether removal was proper. As one Circuit Court stated, "[w]here there is complete diversity of citizenship, . . . the inclusion of an unserved resident in the action does not defeat removal under 28 U.S.C. § 1441(b)." *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001); *See also, Republic Western Ins. Co. v. International Ins. Co.*, 765 F. Supp. 628, 629 (N.D. Cal. 1991) (stating that in cases where complete diversity exists, "a resident defendant who has not been served may be ignored in determining removability") (quoting 14B C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3723, at 341 (2d Ed. 1985)); *In re Bridgestone/Firestone, Inc.*, 184 F.

Supp. 2d 826, 828 (S.D. Ind. 2002) (in case where complete diversity clearly existed, court held that "section 1441(b) would have precluded removal . . . only if [resident of forum state] had been properly served, and [since] it had not been served at the time Ford filed the removal petition," the case was removable).

The other cases that Plaintiffs cite in support of their position are wholly unpersuasive because they are either factually dissimilar, involve different legal issues, or both. In fact, these cases support Wal-Mart's position that removal was proper. *See, e.g., Recognition Communications, Inc. v. American Automobile Association, Inc.*, 1998 WL 119528, *3 (N.D. Tex.) (stating that "the citizenship of unserved defendants should generally not be considered when determining which defendants must join in a removal notice."); *Republic Western Ins. Co. v. International Ins. Co.*, 765 F. Supp. 628, 629 (N.D. Cal. 1991) (removal was proper because the local defendant had not been served); *Windac Corp. v. Clarke*, 530 F. Supp. 812, 813 (D. Neb. 1982) ("When a defendant has not been 'served,' however, within the meaning of the statute, citizenship in the forum state does not defeat removal jurisdiction.").

Accordingly, the Court finds that defendant Wal-Mart's removal of this action to federal court was proper.

III. CONCLUSION

For the aforementioned reasons, the Court DENIES Plaintiffs' motion to remand [doc. No 10-1]

IT IS SO ORDERED

Dated: July 22, 2003

/s/ Barry Ted Moskowitz
Honorable Barry Ted Moskowitz
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed MAR 4, 2004]

Case Number SACV04-0253 GLT

MEERA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,
Plaintiff(s)

v.

OLINA HARWER, M.D., BARR LABORATORIES, INC., and DOES 1 through 100, Inclusive,
Defendant(s).

CERTIFICATION AND NOTICE OF INTERESTED PARTIES
(Local Rule 7.1-1)

TO: THE COURT AND ALL PARTIES APPEARING OF RECORD:

The undersigned, counsel of record for BARR LABORATORIES, INC. (or party appearing in pro per), certifies that the following listed party (or parties) has (have) a direct, pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal. (Use additional sheet if necessary.)

PARTY	CONNECTION
(List the names of all such parties and identify their connection and interest.)	
Meera Samanta	Plaintiff
Barr Laboratories, Inc.	Defendant

Date: March 4, 2004

/s/ Siobhan A. Cullen

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

[Filed MAR 22, 2004]

Case No. SA CV 04-0253 GLT (ANx)
Date: March 18, 2004
Title: Merra Samanta v. Olina Harwer, et al.

PRESENT:

HON. Gary L. Taylor JUDGE

Lisa Bredahl	None Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None Present	None Present

PROCEEDINGS: ORDER TO SHOW CAUSE RE: REMOVAL [In Chambers]

On February 9, 2004, Defendant Barr Laboratories removed this action to federal court, invoking diversity jurisdiction. Defendant Barr Laboratories asserts it is incorporated in Delaware and its principle place of business is in New York. Plaintiffs are California citizens. Defendant Dr. Harwer is a California resident but has not been properly served.

> A nonresident defendant cannot remove a 'nonseparable' action if the citizenship of any codefendant, joined by the plaintiff in good faith, destroys complete diversity, regardless of service or nonservice upon the codefendant . . . . Whenever federal jurisdiction in a removal case

> depends upon complete diversity, the existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service.

Clarence E. Morris, Inc. v. Vitek, 412 F.2d 1174, 1176 (9th Cir. 1969) (citing *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939)).

Although Defendant Dr. Harwer has not been served or responded to the complaint, he remains a named defendant. Removal does not appear appropriate.

Defendant Barr Laboratories is ordered to show cause in writing not later than April 17, 2004, why this case should not be remanded back to state court.

INITIALS OF DEPUTY CLERK LB

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. SACV04-0253 GLT (ANx)

MERRA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,

Plaintiff,

vs.

OLINA HARWER, M.D.; BARR LABORATORIES, INC.; and DOES 1 through 100, inclusive,

Defendants.

DEFENDANT'S RESPONSE TO THE ORDER TO SHOW CAUSE IN WRITING WHY REMOVAL IS APPROPRIATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[DECLARATION FILED CONCURRENTLY HEREWITH]

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

Defendant Barr Laboratories, Inc. ("Barr"), through its attorneys, Drinker Biddle & Reath LLP, hereby responds to the Court's March 18, 2004, Order requiring Barr to show cause in writing why removal is appropriate.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On March 4, 2003, Barr filed its Notice of removal pursuant to 28 U.S.C. § 1441. This is a civil action of which this

Court has original jurisdiction under 28 U.S.C. § 1332(a), in that the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs and it is between citizens of different states, when the citizenship of the fraudulently joined defendant is disregarded.

On March 18, 2004, the Court issued an Order to Show Cause in writing why removal is appropriate. In that Order, the Court quoted language from *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969), indicating its interest in further briefing regarding why the case should not be remanded when plaintiff has named an unserved in-state defendant. Accordingly, this response addresses the fraudulent joinder of the in-state defendant. Jurisdictional facts regarding timing of the Notice of Removal pursuant to 28 U.S.C. § 1446 and the amount in controversy, addressed in the Notice of Removal, are not repeated but are incorporated herein.

II. STATEMENT OF FACTS

On November 13, 2003, plaintiff commenced an action in the Superior Court of the State of California for the County of Orange, captioned *Meera Samanta, individually, and as successors in interest to the estate of Parineeta Samanta, vs. Olina Harwer, MD., Barr Laboratories, Inc., and Does 1 through 100, Inclusive*, Case No. 03CC13673.

To the best of its knowledge, information, and belief, Barr Laboratories, Inc. ("Barr") first received a copy of the complaint and summons on January 12, 2004. (See Declaration of Siobhan Cullen, counsel for Barr ("Cullen Declaration"), attached as Exhibit A, ¶ 2.) On February 10, 2004, Barr filed its answer to the complaint.

According to plaintiff's complaint, decedent Parineeta Samanta was a resident of the State of California, and plaintiff Meera Samanta, individually and as successor in interest

to the Estate of Parineeta Samanta, is a resident of the State of California. (*See* Complaint, Exhibit B, ¶ 1.)

Barr Laboratories, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York.

Plaintiff's complaint states that Olina Harwer, M.D. ("Dr. Harwer") is licensed to practice in the State of California and provided care to decedent at her offices in Orange County, California. (Complaint, Exhibit B, ¶ 1.)

On February 24, 2004, counsel for Barr checked the docket in the state court action and learned that the plaintiff had not served Dr. Harwer, despite the requirements of Rule 201.7(b) of the California Rules of Court, which provides: "The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the filing of the complaint. (See Cullen Declaration, Exhibit A, ¶ 3.) To the best of Barr's knowledge, information and belief, as of this date plaintiff still has not served Dr. Harwer, the only resident of California named as a defendant in plaintiff's complaint, with the Summons issued by the state court. Neither has plaintiff requested that a summons be issued by this Court for service upon Dr. Harwer. *Id.* ¶ 4.

Prior to removal, plaintiff did not file an application for a state court order extending the time to serve a pleading, as provided by the California Code of Procedure ("C.C.P.") Rule 201.7(e), nor is there any other evidence in the state court docket, the federal court docket, or elsewhere that plaintiff intends to serve Dr. Harwer. (See Cullen Declaration, Exhibit A, ¶ 5.) Furthermore, the state court on its own motion did not extend or otherwise modify the C.C.P. Rule 201.7 requirement that the complaint must be served on all named defendants and proofs of service on those defendants must be filed within 60 days after the filing of the complaint.

In checking the docket of the state court action on or about February 24, 2004, counsel for Barr also learned for the first time that Dr. Harwer has never answered plaintiff's complaint. *Id.* ¶ 6. Barr Laboratories, Inc., expected service of a responsive pleading by Dr. Harwer on approximately February 13, 2004, which would have been approximately 30 days from the last day on which plaintiff could have timely served Dr. Harwer, plus two days for mailing. Not until February 24, 2004, when counsel for Barr Laboratories, Inc., consulted the state court docket and learned that Dr. Harwer has never filed a responsive pleading, did Barr first ascertain that the case had become removable. At that time, it became evident that Dr. Harwer had never been served, plaintiff did not intend to proceed against her, and Dr. Harwer had been joined fraudulently to defeat diversity.

Complete diversity exists pursuant to 28 U.S.C. § 1441, as the presence of fraudulently joined defendant is not relevant for purposes of determining the existence of diversity jurisdiction. See *United Computer Systems, Inc. v. AT&T Corp.*, 298 F.3d 756, 762 (9th Cir. 2002). Dr. Harwer's California citizenship is, therefore, no bar to diversity jurisdiction.

The presence of Does 1 through 100 cannot defeat diversity, as 28 U.S.C. § 1441(a) provides: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded." To the best of Barr's knowledge, information and belief, no defendant other than Barr has been served with process. (See Cullen Declaration, Exhibit A, ¶ 7.) Accordingly, Barr was the only defendant in this action and no joinder in the removal petition was necessary.

III. LAW AND ARGUMENT

A. THE CITIZENSHIP OF THE RESIDENT DEFENDANT SHOULD BE DISREGARDED FOR DETERMING DIVERSITY JURISDICTION, AS PLAINTIFF HAS NO INTENTION OF SERVING HER AND HAS JOINED HER FRAUDULENTLY FOR THE PURPOSE OF DEFEATING FEDERAL DIVERSITY

The citizenship of a fraudulently joined defendant is not relevant for purposes of determining the existence of diversity jurisdiction. *See United Computer Systems, Inc. v. AT&T Corp.*, 298 F.3d 756, 762 (9th Cir. 2002) citing *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) and *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). See also *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969), cited in this Court's Order to Show Cause Regarding Removal (stating, "A nonresident defendant cannot remove a 'nonseparable' action if the citizenship of any codefendant, joined by the plaintiff in good faith, destroys complete diversity. . .") (emphasis added).

As this Court noted in its Order to Show Cause why removal in this action is appropriate, the mere fact that a resident defendant has not been served is not of itself sufficient to constitute fraudulent joinder in a nonseparable controversy. See *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969) (citing *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939)). However, "where it appears that the plaintiff has no intention of serving the resident defendant [] and attempting to recover judgment against [her], the Court is justified in concluding, as a matter of fact, that [she was] joined in bad faith for the sole purpose of defeating Federal jurisdiction, and that, hence, the joinder is fraudulent." *Twentieth Century-Fox Film Corporation*, 129 F. Supp. 845, 848 (S.D. Cal. 1955) (finding plaintiffs statements in memo-

randum for setting trial filed in State court supported conclusion that defendants were joined for purpose of preventing federal jurisdiction). See also, e.g., *Johnson v. Scimed, Inc.*, 92 F. Supp.2d 587, 590 (W.D. La. 2000) (stating, "A party will be considered fraudulently joined—and removal will be permitted—when the plaintiff . . . does not intend to secure a judgment against that particular defendant." Citing Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3723, p. 631-36 (3d ed. 1998)); *Kohl v. American Home Products Corp.*, 78 F. Supp.2d 885, 889 (W.D. Ark. 1999).

Plaintiff clearly has no intention of prosecuting an action against Dr. Harwer, but rather has named her as a defendant for the fraudulent purpose of defeating Barr's right to have this case heard in federal court. Plaintiff's Complaint was filed over five months ago. Nevertheless, even in the face of Barr's removal petition, filed over a month ago on grounds of fraudulent joinder, plaintiff has continued to evince her lack of intention to serve Dr. Harwer. Plaintiff has neither served Dr. Harwer with the Summons issued by the state court on November 13, 2003, nor has she sought issuance of a summons from this Court for service upon Dr. Harwer. By the very language of Rule 4(m) of the Federal Rules of Civil Procedure, which requires service of a summons and complaint within 120 days of the filing of a complaint, plaintiff's action would now be subject to dismissal if the Complaint had been filed in federal court.

IV. CONCLUSION

All prerequisites for removal have been satisfied. Barr filed its Notice of Removal within 30 days of having first ascertained that this case is removable. Complete diversity exists as to the properly joined parties; and, as set forth in its notice of removal, the amount in controversy exceeds Seventy-Five Thousand Dollars ($75,000.00), exclusive of interest and costs.

If any additional question arises as to the propriety of the removal of this action, Barr requests the opportunity to present a supplemental brief, limited discovery, and/or oral arguments in support of its position that this case is properly removed.

For the foregoing reasons, defendant Barr Laboratories, Inc., hereby respectfully submits that removal of this action was appropriate, and that the case should not be remanded to the Superior Court of the State of California for the County of Orange.

DATED: April 15, 2004

DRINKER BIDDLE & REATH LLP

By: /s/ Siobhan A. Cullen
DONALD F. ZIMMER, JR.
SIOBHAN A. CULLEN
Attorneys for Defendant
BARR LABORATORIES, INC.

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. SACV04-0253 GLT (ANx)

MERRA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,

Plaintiff,

vs.

OLINA HARWER, M.D.; BARR LABORATORIES, INC.; and DOES 1 through 100, inclusive,

Defendants.

DECLARATION OF SIOBHAN A. CULLEN IN SUPPORT OF DEFENDANT'S RESPONSE TO THE ORDER TO SHOW CAUSE IN WRITING WHY REMOVAL IS APPROPRIATE

[MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; AND DECLARATION FILED CONCURRENTLY HEREWITH]

I, Siobhan A. Cullen, declare as follows:

1. I am an attorney at the law firm of Drinker Biddle & Reath LLP, counsel of record for defendant Barr Laboratories, Inc. ("Barr"). I am a member in good standing of the State Bar of California. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. To the best of its information and belief, Barr first received a copy of the complaint and summons at its offices in Pomona, New York on January 12, 2004.

3. On February 24, 2004, I checked the docket in the state court action and learned that the in pro per plaintiff had not served Dr. Harwer, despite the requirements of Rule 201.7(b) of the California Rules of Court.

4. To the best of my information and belief, as of this date plaintiff still has not served Dr. Harwer, the only resident of California named as a defendant in plaintiffs complaint. Neither has plaintiff requested that a summons be issued by this Court for service upon Dr. Harwer. Copies of both the state and federal court dockets regarding this action are attached hereto as Exhibit 1.

5. Plaintiff did not file an application for a court order extending the time to serve a pleading, as provided by the California Code of Procedure Rule 201.7(e), nor is there any other evidence in the docket or elsewhere that plaintiff intends to serve Dr. Harwer.

6. When checking the docket of the state court action on or about February 24, 2004, I also learned for the first time that Dr. Harwer has never answered plaintiffs complaint.

7. To the best of my knowledge, information, and belief, no defendant other than Barr has been served with process in this action.

Executed on April 15, 2004 at San Diego, California.

/s/ Siobhan A. Cullen
SIOBHAN A. CULLEN

EXHIBIT 1

U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(Southern Division—Santa Ana)

Civil Docket for Case #: 8:04cv00253

MERRA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,

Plaintiff,

vs.

OLINA HARWER, M.D.; BARR LABORATORIES, INC.; and DOES 1 through 100, inclusive,

Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
03/04/2004	1	NOTICE OF REMOVAL by defendant Barr Laboratories, Inc from Superior Court of CA, County of Orange [Case Number 03CC13673] with copy of summons and complaint. Case assigned to Judge Gary L. Taylor, Discovery to Magistrate Judge Arthur Nakazato (Filing fee $ 150). (kks) (Entered: 03/10/2004)
03/04/2004		ANSWER filed by defendant Barr Laboratories, Inc. (kks) (Entered: 03/10/2004)
03/04/2004	2	CERTIFICATION AND NOTICE of Interested Parties filed by Defendant Barr Laboratories, Inc. (kks) (Entered: 03/10/2004)

DATE	NO.	PROCEEDINGS
03/05/2004	4	NOTICE to adverse party of removal of civil action to USDC filed by defendant Barr Laboratories, Inc. (dmjr,) (Entered: 03/12/2004)
03/05/2004	5	PROOF OF SERVICE filed by defendant Barr Laboratories, Inc. re [4] Notice, Civil Cover Sheet; Certification and Notice of Interested Parties (see document for details) was served on 03/05/04. (1n,) (Entered: 03/17/2004)
03/11/2004	3	ORDER by Judge Gary L. Taylor re: early meeting of parties, Set/Reset Hearings: Scheduling Conference set for 5/17/2004 09:00 AM before Honorable Gary L. Taylor. (dmjr,) (Entered: 03/11/2004)
03/12/2004	6	AMENDED DOCUMENT filed by Defendant Barr Laboratories, Inc. Amendment to Notice (Other)[4] (dmjr,) (Entered: 03/19/2004)
03/18/2004	7	MINUTES OF In Chambers before Judge Gary L. Taylor: Defendant Barr Laboratories is Ordered to Show Cause in writing not later than 4/17/2004 why this case should not be remanded back to state court. Court Reporter: None Present (mt,) (Entered: 03/22/2004)
03/24/2004	8	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case by Joseph P Thomas for Barr Laboratories, Inc, designating Siobhan A Cullen as local counsel. Fee paid. Approved by Judge Gary L. Taylor. (dmjr,) (Entered: 03/25/2004)

DATE	NO.	PROCEEDINGS
03/24/2004	9	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case by Karen Imbus for Barr Laboratories, Inc, designating Siobhan A Cullen as local counsel. Fee paid. Approved by Judge Gary L. Taylor. (dmjr,) (Entered: 03/25/2004)

62

(2)

No. 07-20

FILED
AUG 2 200
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BARR LABORATORIES, INC.,

Petitioner,

v.

MEERA SAMANTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JOHN DERRICK
Counsel of Record
THE LAW OFFICE OF JOHN DERRICK
21 East Pedregosa Street
Santa Barbara, CA 93101
(805) 284-1660

Attorney for Respondent

210173

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The questions on which this case turns are simpler than Petitioner maintains:

1. If a plaintiff in a state court action sues a resident and nonresident defendant, asserting properly pled causes of action against both, but fails to serve the resident defendant in a timely manner, may the nonresident defendant, without further grounds, invoke the doctrine of fraudulent joinder in order to remove the case to federal court?

2. If an action is improperly removed, is the jurisdictional defect cured by an entry of judgment by the district court if a nondiverse defendant who has never been served has also never been dismissed from the action?

TABLE OF CONTENTS

Page

Counter-Statement of Questions Presented i

Table of Contents ii

Table of Cited Authorities vi

Introduction 1

Statement of the Case 2

1. The parties and the underlying lawsuit 2

2. The service and nonservice of the defendants 3

3. The removal by the nonresident defendant ... 3

4. The district court's clearly erroneous finding that no summons had been issued against the resident defendant 4

5. Plaintiff's unsuccessful effort to have the case remanded 5

6. The appeal to the Ninth Circuit 5

Reasons for Denying the Petition 6

A. This Is A Procedurally Unusual Case That Would Not Present A Good Vehicle For Reviewing Fraudulent Joinder, Even If Review Of That Doctrine Were Needed 6

Contents

Page

B. Existing Law Provides Methods Of Dealing With Unserved Resident Defendants Without Invoking Fraudulent Joinder 6

(i) Petitioner is asking this Court to deal with a problem that does not exist 6

(ii) Once the unserved resident defendant has been dismissed by the state court, diversity jurisdiction would at that point arise 7

(iii) The issue of whether to dismiss Harwer as an unserved defendant would have come before the California Superior Court at a Case Management Conference 8

(iv) Whatever "new and novel" schemes may exist to defeat federal jurisdiction, they do not feature in this case 9

C. The Rule Advocated By Petitioner Would Be Impractical And Would Violate State Sovereignty 10

(i) A state court is much better placed than a federal district court to determine the intent of a plaintiff before it 10

Contents

Page

(ii) Federalism concerns call for strict construction of the removal process ... 11

(iii) A finding that removal was proper in this case would violate established principles of federalism 11

D. This Court's Prior Holdings Do Not Require A Decision Different From The One Reached In This Case By The Ninth Circuit 12

(i) Petitioner appears confused as to whether new law needs to be fashioned in order to produce the result it wants ... 12

(ii) *Wilson v. Republic Iron & Steel Co.* does not support Petitioner's position 13

(iii) *Wecker v. National Enameling & Stamping Co.* does not support Petitioner's position 14

(iv) Even if "intent" were relevant, this Court has held that the fact of nonservice cannot justify removal 16

E. There Is No Circuit Split On The Issue On Which This Case Turns 17

(i) Semantic variations do not amount to a Circuit split 17

Contents

Page

(ii) Barr has not shown that any of the Circuits reject the use of extrinsic evidence to pierce the veil 19

(iii) Barr has not shown that any of the Circuits have adopted its "intent test" .. 19

F. The Jurisdictional Defect Was Not Cured By The Time The District Court Entered Judgment 20

G. Dismissal Of The Resident Defendant By The Ninth Circuit Would Have Been Improper Because She Is Not A Dispensable Party ... 23

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

CASES

Caterpillar Inc. v. Lewis
519 U.S. 61 (1996) 7, 20, 21, 22

Clarence E. Morris, Inc. v. Vitek
412 F.2d 1174 (9th Cir. 1969) 13

Farias v. Bexar County Bd. of Trustees
925 F.2d 866 (5th Cir. 1991) 21

Healy v. Ratta
292 U.S. 263 (1934) 11

Herzig v. Twentieth Century-Fox Film Corp.
129 F.Supp. 845 (C.D. Cal. 1955) 17

In re Briscoe
448 F.3d 201 (3rd Cir. 2006) 19

McCabe v. General Foods Corp.
811 F.2d 1336 (9th Cir. 1987) 5, 15

Mecom v. Fitzsimmons Drilling Co.
284 U.S. 183 (1931) 14

Mitchum v. Foster
407 U.S. 225 (1972) 10

Newman-Green, Inc. v. Alfonzo-Larrain
490 U.S. 826 (1989) 23

Cited Authorities

Page

Pullman Co. v. Jenkins
305 U.S. 534 (1939) 16

Ritchey v. Upjohn Drug Co.
139 F.3d 1313 (9th Cir. 1998) 16, 19

Shamrock Oil & Gas Corp. v. Sheets
313 U.S. 100 (1941) 11

Terzian v. County of Ventura
24 Cal.App.4th 78 (1994) 9

Travis v. Irby
326 F.3d 644 (5th Cir. 2003) 18

U.S. ex. rel. Walker v. Gunn
511 F.2d 1024 (9th Cir. 1975) 10

Watt v. Alaska
451 U.S. 259 (1981) 20

Wecker v. National Enameling & Stamping Co.
204 U.S. 176 (1907) 14, 15, 16, 19

Wilson v. Republic Iron & Steel Co.
257 U.S. 92 (1921) 12, 13, 16

Cited Authorities

Page

STATUTE & RULE

28 U.S.C. § 1446 10

California Rule of Court 3.728(8) 8

OTHER AUTHORITY

16 *Moore's Federal Practice* § 107.14[2][c][iv][A] 18

INTRODUCTION

Petitioner is asking the Court to deal with a problem that does not exist. It wants the Court to review what should happen if a plaintiff in a state court action sues both a resident and nonresident defendant, but then omits to serve the resident one. According to Petitioner, that can be a ruse to defeat diversity jurisdiction, such that the doctrine of fraudulent joinder should provide a remedy.

There is, however, a simple solution already in place that does not involve invoking that doctrine. In a nutshell, unserved resident defendants against whom no litigation efforts are made in a state action will face dismissal by the state court at an early stage. There is no need for federal courts to involve themselves in that process. Once unserved defendants are dismissed, a case can be removed if the requirements for diversity jurisdiction are then present.

The rule advocated by Petitioner is, moreover, squarely at odds with the settled rule — long ago stated by this Court — that nonservice of a resident defendant cannot, of itself, be the basis for invoking diversity jurisdiction.

Even if this Court were inclined to review the scope of the doctrine of fraudulent joinder, the rather unusual facts now before it suggest that some other case would provide a better "vehicle." This case is a procedurally unusual one whose outcome was built on two misunderstandings. One was the pro se plaintiff's misunderstanding concerning whether the resident defendant had, in fact been served. The other was the district court's misunderstanding of whether a state court summons had even been issued against the resident defendant. That peculiar combination of circumstances — which drove the outcome of the case — may never occur again.

That point aside, Petitioner offers no convincing argument about why fraudulent joinder, in general, is in need of review. Contrary to what it suggests, there is no meaningful Circuit split — certainly not on any issue that would determine the outcome of this case. And although Petitioner talks vaguely about "new and novel" developments in removal jurisprudence that supposedly require new law, it fails to explain what these are and how they feature in the present case.

The other issue raised by Petitioner concerns whether a jurisdictional defect in removal is cured by the subsequent entry of judgment in federal court if a nonresident defendant remains unserved but is never dismissed from the action. Here, Petitioner states that the Ninth Circuit's unpublished decision did not follow a settled decision by this Court. Even if that were so, that would not — in itself — provide a compelling reason for granting certiorari. Moreover, as shown in this brief, the Ninth Circuit's decision was not inconsistent with this Court's previous holdings.

STATEMENT OF THE CASE

1. The parties and the underlying lawsuit

Petitioner Barr Laboratories ("Barr") is a New York-resident corporation. (Barr Appendix ("App.") at 20a.) Respondent Meera Samanta ("Samanta") is a California resident. (*Id.*)

Samanta, as a pro se litigant, filed a California state court action against Barr in which she also named as a defendant Dr. Olina Harwer ("Harwer"). (App. 34a, 36a, 49a.) Harwer is a doctor of medicine who is a resident of California. (App. 36a.)

Samanta pled various causes of action arising out of the death of her daughter. (App. 34a-50a.) She alleged that her daughter's death was caused by a drug prescribed by Harwer and manufactured by Barr. (*Id.*) Barr — referring to the claims against Harwer — acknowledges that Samanta "pled the necessary elements of valid claims against the non-diverse defendant. . . ." (Barr Petition at 7.)

2. The service and nonservice of the defendants

Barr was served in a timely manner and filed an answer. (App. 20a.) A state court summons was issued against Harwer. (App. 30a.) However, it appears that Harwer was not served. (App. 26a.)

Samanta stated subsequently that she had understood that service of Harwer *had* taken place. (*See* Excerpts of Record filed in Ninth Circuit at 82.) She was, apparently, mistaken. That was the first of the two misunderstandings that drove the procedural history of this case.

3. The removal by the nonresident defendant

Before Samanta understood what was taking place, Barr removed the case to federal court on diversity grounds. (App. 19a.) The district court, reviewing the removal sua sponte, issued an order to show cause as to why the case should not be remanded for lack of federal jurisdiction. (App. 67a.)

The district court noted that Barr was not a California resident, but that Harwer was. (App. 67a.) It further noted that Harwer had not been "properly served." (*Id.*) And it then cited authority to the effect that nonservice of a defendant who was joined in good faith was irrelevant and that diversity arises from the citizenship of the parties named and not from the fact of service. (App. 67a-68a.) The order to show cause

concluded: "Although Defendant Dr. Harwer has not been served or responded to the complaint, [s]he remains a named defendant. Removal does not appear appropriate." (App. 68a.)

In response, Barr filed papers arguing why federal jurisdiction was proper. (App. 69a.) The gist of its argument was that the nonservice of Harwer indicated that Samanta had no intention to proceed against that defendant, such that removal was warranted under the doctrine of "fraudulent joinder." (App. 69a-75a.) Samanta — who remained pro se — did not file an opposition at that point.

4. The district court's clearly erroneous finding that no summons had been issued against the resident defendant

After reviewing Barr's papers, the district court vacated its order to show cause, finding that the removal was proper. (App. 10a.) However, the reason that it gave was that no state or district court summons had been issued against Harwer. (*Id.*)

That was clearly erroneous. Barr itself had indicated in its papers that a state court summons *had* been issued against the doctor. (App. 74a.) Indeed, a copy of that summons is included in Barr's Appendix to its petition now before this Court. (App. 30a.) Barr's point was merely that *service* had not been carried out.

That was the second of the misunderstandings that led to this case proceeding in federal court. Unfortunately, Barr did not act to correct the district court's mistake.

5. Plaintiff's unsuccessful effort to have the case remanded

Later in the district court proceedings, Samanta filed papers asking for the case to be remanded to state court. (*See* Excerpts of Record filed in Ninth Circuit at 81 et seq.) In these, she stated that Harwer had been joined in good faith, that she understood the doctor to have been served, and that it was a "misrepresentation" to say that there was really no lawsuit filed against the doctor. (*Id.*)

The district court refused to remand the case. (App. 8a-9a.) This refusal was stated in an order that also granted a motion for summary judgment brought by Barr. (App. 7a-9a.)

6. The appeal to the Ninth Circuit

Samanta appealed. The Ninth Circuit reversed on jurisdictional grounds, stating — in an unpublished memorandum decision — that the district court had applied an incorrect test with respect to fraudulent joinder. (App. 2a-4a.) The Ninth Circuit explained that the correct test — treating "fraudulent joinder" as a "term of art" — focuses on whether a plaintiff states a cause of action against a resident defendant. (App. 3a, citing to *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).)

While the Ninth Circuit appeal was underway, the California Superior Court — from which the case was removed — held a hearing to review the status of the case while the arguments concerning jurisdiction were being resolved in federal court. The parties who were represented by counsel at that hearing included not only Barr and Samanta, but also Harwer. (*See* Samanta's Request for Judicial Notice filed with the Ninth Circuit on August 3, 2005.) However, that fact was not referenced in the Ninth Circuit's decision. (App. 2a-4a.) Indeed, the Ninth Circuit did not rule on the Request for Judicial Notice that drew this to its attention. (*Id.*)

REASONS FOR DENYING THE PETITION

A. This Is A Procedurally Unusual Case That Would Not Present A Good Vehicle For Reviewing Fraudulent Joinder, Even If Review Of That Doctrine Were Needed

Even if this Court were to want to review the doctrine of fraudulent joinder, this case would not offer a good "vehicle" for that purpose. The case developed in the way that it did because of two misunderstandings (neither of which are acknowledged in Barr's discussion of the case, even though the existence of both is shown in the record). One was Samanta's misunderstanding about whether Harwer had been served. The other was the district court's misunderstanding about whether a state court summons had been issued against Harwer.

Together, these misunderstandings led to a very peculiar and messy set of circumstances, which are unlikely to be repeated. The cases cited by Barr show that issues related to fraudulent joinder do arise from time to time in the Circuit Courts of Appeals. Other cases would present better vehicles for a review of this area — if, indeed, any review were needed.

B. Existing Law Provides Methods Of Dealing With Unserved Resident Defendants Without Invoking Fraudulent Joinder

(i) Petitioner is asking this Court to deal with a problem that does not exist

Quite apart from the fact that this case would not be a suitable vehicle for a review of fraudulent joinder in general, Barr fails to show why such a review is needed.

The gist of Barr's argument is that a showing of "intent not to proceed" should suffice for the doctrine to be invoked because, otherwise, it would be too easy for a plaintiff to plead a cause of action against a resident defendant simply in order to avoid diversity jurisdiction. Barr's case relies on the assumption that an "intent not to proceed" can be inferred from a failure to serve a resident defendant in a timely manner — because, in the present case, there was absolutely nothing else from which an intent not to proceed could possibly be inferred.

Barr's theory is badly flawed. As shown below, it overlooks the fact that if a plaintiff does not prosecute an action against a resident defendant even by effecting service, the state court will simply dismiss the action relatively early on. Diversity jurisdiction will then arise. Thus, there is *no need* to turn to a federal court to get rid of a "spoiler" defendant. Barr is asking this Court to fashion a judicial remedy to address a problem that does not exist.

(ii) Once the unserved resident defendant has been dismissed by the state court, diversity jurisdiction would at that point arise

If the dismissal of an unserved defendant means that only nonresident defendants remain, then diversity jurisdiction will, *at that point*, be invoked. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 69-69 (1996). This is because an exception to the rule of testing removal by reference to the "state of things" at the outset is that diversity may be established through the dismissal of a resident defendant at any time prior to judgment. *Id.*

What this means is that a nonresident defendant who is skeptical about whether a plaintiff actually plans to proceed against any unserved resident defendants should take those

concerns to the state court in the first instance. If the state court dismisses the action against those defendants, the nonresident defendant can then obtain the desired federal jurisdiction.

(iii) The issue of whether to dismiss Harwer as an unserved defendant would have come before the California Superior Court at a Case Management Conference

In California, at least, dismissal in state court actions does not happen automatically through the passage of time, even if service does not take place by a prescribed limit. Rather, it requires an order by the Superior Court (the trial court). Such an order was never made with respect to Harwer.

The time at which such an order would generally be made is at a Case Management Conference. California Rule of Court 3.728(8) provides for the Case Management Conference Order to include "the dismissal or severance of unserved or not-appearing defendants from the action." However, in this case, Barr swooped and removed the case *before* a Case Management Conference had occurred. (App. 81a.)

Barr should have exercised more patience. In fact, it would not have had to wait long. The record shows that a Case Management Conference was scheduled for March 23, 2004. (App. 28a.) The notice of removal was dated March 4, 2004. (App. 25a.) That was less than three weeks before the Case Management Conference would have provided an opportunity for Barr to have requested Harwer's dismissal.

Even if there had been a Case Management Conference, the dismissal of Harwer would not have been mandatory if there were good cause to allow more time. Under California

law, the decision as to when to dismiss an unserved defendant is in the trial court's discretion. *Terzian v. County of Ventura*, 24 Cal.App.4th 78, 83 (1994). Thus, if the state court had found that Samanta had been honestly mistaken as to the fact of service, more time could have been allowed for her to do that which she had understood had already been done.

(iv) Whatever "new and novel" schemes may exist to defeat federal jurisdiction, they do not feature in this case

Barr's Petition states: "Increasingly, plaintiffs are employing new and novel strategies to frustrate defendants' legitimate rights to remove actions to federal court." (Barr Petition at 6.)

Barr does not explain what these "new and novel" strategies are, but they are surely nothing that features in the fact pattern of this case. Even if one were to assume that Samanta were involved in a scheme to evade federal jurisdiction (and no such concession is made), the chosen method would hardly be "novel." A plan to leave Harwer unserved would simply be rather ill-thought-out, futile, and ineffective — as it would lead, before long, to a dismissal, which would defeat the purpose. The intervention of this Court is hardly needed to deal with that.

So if there are these unspecified "new and novel" tricks out there that need to be reined in, it would make sense to review them by granting certiorari with respect to a case whose facts are on point. This is no such case.

C. The Rule Advocated By Petitioner Would Be Impractical And Would Violate State Sovereignty

(i) A state court is much better placed than a federal district court to determine the intent of a plaintiff before it

The removal scheme allows a defendant to remove a case merely by filing a notice of removal. 28 U.S.C. § 1446. No motion or hearing is necessary in the state court from which the case is removed (or, for that matter, in the federal court to which it is removed). *Id.*

Rather, the removal is effective as soon as the defendant files a proper notice of removal that meets the requirements of the statute. 28 U.S.C. § 1446(d). After a case is removed, the state court may no longer rule on any matter in the case. *Mitchum v. Foster*, 407 U.S. 225, 234 n.12 (1972).

All of this is a very invasive procedure. *U.S. ex. rel. Walker v. Gunn*, 511 F.2d 1024, 1027 (9th Cir. 1975). Removal is performed in "derogation of state sovereignty." *Id.*

When it comes to deciding whether a plaintiff has a bona fide intention to proceed against a resident defendant against whom a facially valid cause of action has been pled, there may be a myriad of issues known to and understood by the trial judge in the state court, but not a district court.

There may be perfectly acceptable reasons why a defendant has not been served. The trial judge who has been handling that matter in state court is far better placed to make that call than a district court judge who sees the case land on the federal docket out of the blue.

Hence, the rule advocated by Barr is not only unnecessary, it is also impractical.

(ii) Federalism concerns call for strict construction of the removal process

Due to the invasiveness of the removal process, federal courts have long recognized that it raises significant federalism questions. *See, e.g., Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (recognizing federalism concerns inherent in the removal process).

These concerns have led to a strict construal of removal statutes, lest, through judicial laxity, the proper powers of the states might be invaded. *Healy v. Ratta*, 292 U.S. 263, 270 (1934); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. at 108-109.

(iii) A finding that removal was proper in this case would violate established principles of federalism

If what took place in the present case at the trial court level were found to be a proper method of establishing diversity jurisdiction based on removal, a rule of law would be created that any nonresident defendant, unhappy at the pace of proceedings in state court against a resident defendant, could file a notice of removal and, in essence, ask the district court to second-guess whether the state court had acted sufficiently quickly to dismiss unserved defendants.

Such a rule would not only impose a burden on overworked district courts, in making them the overseers of their state court counterparts, but it would also intrude on the rights of state courts to manage their own affairs. It would stretch the removal statute and thus contravene this Court's mandate calling for strict construal.

Moreover, if one accepted that nonservice could be grounds for removal on this basis, then, logically, there would be no reason why other indicators suggesting a "lack of intent

to proceed" could not also be used — tardiness in discovery, for example.

There is no reason even to entertain such a novel theory of removal by granting the Petition now before the Court.

D. This Court's Prior Holdings Do Not Require A Decision Different From The One Reached In This Case By The Ninth Circuit

(i) Petitioner appears confused as to whether new law needs to be fashioned in order to produce the result it wants

Barr appears unclear whether it is asking the Court to fashion new rules or whether it is simply asking the Court to restate and apply the existing doctrine of fraudulent joinder. On the one hand, Barr writes: "Existing precedent from this Court does not fully address the complex and myriad issues arising in lawsuits around the country that are removed to federal court today." (Barr Petition at 6.) This suggests that — in Barr's opinion — new law needs to be fashioned.

On the other hand, Barr relies on *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), in an effort to position the rule that it advocates as consistent with this Court's prior decisions. (Barr Petition at 6-7.)

Thus, one is left wondering whether all that Barr actually seeks is the correction of what it sees as an erroneous, unpublished Ninth Circuit case, or whether it wants new law to be carved out that would work more beneficially for it on this rather peculiar set of facts.

(ii) *Wilson v. Republic Iron & Steel Co.* does not support Petitioner's position

In any event, Barr's reliance on *Wilson v. Republic Iron & Steel Co.* is misplaced. Contrary to what Barr suggests, that case does not mandate an outcome in the present case different from the one reached by the Ninth Circuit.

In *Wilson*, this Court found that a party "was joined as a defendant without any purpose to prosecute the action in good faith as against him and with the purpose of fraudulently defeating the employer's right of removal." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. at 98. Based on this, Barr argues that "intent to proceed" has been the proper test all along but has been overlooked at the Ninth Circuit and in various other Circuits.

However, Barr overlooks the fact that in *Wilson*, the Court found that the causes of action against the resident and nonresident defendants were *separable* and that the resident defendant was "not in any degree whatsoever responsible" for the injuries suffered. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. at 94.

Here, Barr has *not* contended that the causes of action in the state court complaint against it and Harwer were legally separable. Moreover, it is plain that they are *not* separable.

Claims are not separate and independent of each other for the purpose of diversity jurisdiction if they grow out of a single actionable wrong for which a single recovery could be obtained no matter how many defendants shared liability. *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969).

Here, the actionable wrong that was alleged was the prescribing by Harwer of a drug manufactured by Barr that

caused the death of Samanta's daughter. The claims against Barr for strict liability and negligence, and those against Harwer for negligence, are intertwined. There is a single injury arising out of the alleged actions, for which liability, if proven, would be shared by the two defendants.

Moreover, this Court — commenting on *Wilson* — has explained that what was present there amounted to proof of *actual fraud*. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 190 (1931) ("The facts disclosed in this record fall far short of proof of actual fraud such as was held sufficient to justify removal in . . . *Wilson v. Republic Iron Co.*"). In the present case, there is no suggestion that Samanta engaged in anything that could be called "actual fraud."

The Court in *Mecom* also endorsed "the principle that in a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined." *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. at 190. This rule puts the emphasis not on what is going on in the mind of the plaintiff, but on the cause of action asserted against the resident defendant. And that is broadly consistent with the test applied by the Ninth Circuit.

(iii) *Wecker v. National Enameling & Stamping Co.* does not support Petitioner's position

Samanta acknowledges that some cases have allowed the district court to pierce the pleadings in deciding whether it has jurisdiction under the doctrine of fraudulent joinder. However, such instances are limited to a strictly circumscribed inquiry involving uncontroverted summary evidence that establishes unmistakably that a diversity-defeating defendant cannot possibly be liable to a plaintiff under applicable state law. The focus is kept on the cause of action, not on the intent of the plaintiff.

That was the nature of the inquiry in *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1907), a case cited by Barr. *Wecker* involved a suit for injuries sustained due to a machine that allegedly was defectively designed. *Id.* at 178. The Court held that a non-diverse defendant was fraudulently joined where uncontradicted affidavits showed that the defendant was merely a draftsman with no responsibility for designing the machine at issue. *Id.* at 183-85.

The type of inquiry conducted in *Wecker* does not involve putting the focus on the subjective intent of the plaintiff. Applying the *Wecker* test to the facts of the present case would make no difference to the outcome. For it to result in a different outcome, there would have had to have been an evidentiary showing along the lines that "Harwer never prescribed Barr's drugs to Samanta's daughter." No such showing was even attempted (nor, for that matter, could it have been, given the undisputed facts of the case).

The *Wecker* test is really just an expanded version of the rule applied by the Ninth Circuit in the present case. It is not inconsistent. The Ninth Circuit said that the test focuses on whether a plaintiff states a cause of action against a resident defendant. (App. 3a, citing to *McCabe v. General Foods Corp.*, 811 F.2d at 1339 (9th Cir. 1987).) *Wecker* also focuses on whether there is a cause of action — only it allows the inquiry to go outside the pleadings to look at uncontroverted evidence relating to whether the cause of action is sustainable.

In the present case, Barr did not offer any extrinsic evidence related to the sustainability of the causes of action against Harwer. That is why it was not necessary for the Ninth Circuit to have engaged in an inquiry to pierce the pleadings. However, the Ninth Circuit has in its fraudulent-joinder case law allowed for a *Wecker*-style inquiry going beyond the

pleadings where suitable evidence *is* offered. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). Thus, there is no reason to believe that the Ninth Circuit has drifted away from *Wecker*.

(iv) Even if "intent" were relevant, this Court has held that the fact of nonservice cannot justify removal

Even if "intent" were the test — or part of it — a removing defendant would need to come up with something different from the fact of nonservice in order to prove it. A case decided by this Court some years after *Wecker* and *Wilson* states that where a nonseparable controversy involves a resident defendant, "the fact that the resident defendant has not been served with process does not justify removal by the non-resident defendant." *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939). It goes on: "[T]he non-resident defendant should not be permitted to seize an opportunity to remove the cause before service upon the resident co-defendant is effected. It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove." *Id.*

The *Pullman* opinion indicated that the Court had in mind circumstances where fraudulent joinder was *not* an issue. *Pullman Co. v. Jenkins*, 305 U.S. at 541. The only way in which one can lend meaning to that qualification is to recognize that fraudulent joinder cannot be inferred by nonservice. In other words, if a cause of action had *not* been established against a resident defendant, then the fact of nonservice *could* then be relevant in finding the joinder to be fraudulent. But where such a cause *has* been established, nonservice becomes *irrelevant*.

What this means is that even if "intent not to proceed" were a relevant inquiry in the fraudulent joinder analysis, such intent could not be inferred from the fact of nonservice. There would have to be something else.

Indeed, in one district court published case relied on heavily by Barr in the proceedings below, and mentioned in its Petition, the plaintiff's lack of intent with regard to unserved defendants was shown not by nonservice, per se, but by an express written statement that he did not want to proceed. *Herzig v. Twentieth Century-Fox Film Corp.*, 129 F.Supp. 845 (C.D. Cal. 1955). In *Herzig*, plaintiff's counsel had made a written representation to the court that no more defendants — including those needed to defeat diversity — would be served. *Id.* at 847.

Furthermore, the district court in *Herzig* noted that the plaintiff had stated that he wished to dismiss the action against all the defendants except for the nonresident one, such "that the only real controversy at the time of the filing of the petition for removal, and presently existing, is between the plaintiff, a resident of California, and the [nonresident] defendant. . . ." *Herzig v. Twentieth Century-Fox Film Corp.*, 129 F.Supp. at 848.

E. There Is No Circuit Split On The Issue On Which This Case Turns

(i) Semantic variations do not amount to a Circuit split

Barr suggests that the Circuits are split on what the fraudulent joinder doctrine entails. (Barr Petition at 14.) However, the differences amount to little more than semantics — and certainly do not entail issues dispositive to this case.

Barr refers to cases across the Circuits that use language such as "no possibility of recovery," "no reasonable basis,"

"no reasonable possibility," or "no colorable claim." However, these all essentially say much the same thing. They put the focus on the cause of action and ask whether it is viable. Barr is trying to conjure up a Circuit split out of linguistic variations that do not reveal any substantive division.

Significantly, the Fifth Circuit in *Travis v. Irby*, 326 F.3d 644 (5th Cir. 2003) — a case that Barr highlights as containing "an in-depth discussion of the various mutations of the fraudulent joinder standard throughout the circuits" (Barr Petition at 14) — does not reach a conclusion that there is a meaningful Circuit split. It seems to treat the different language as gelling into the same overall rule. For example, it comments when referring to the discussion in *Moore's Federal Practice*: "Although these tests appear dissimilar, "absolutely no possibility" vs. "reasonable basis," we must assume that they are meant to be equivalent because each is presented as a restatement of the other." *Travis v. Irby*, 326 F.3d at 647, citing to 16 *Moore's Federal Practice* § 107.14[2][c][iv][A].

However, regardless of whether there is any substantive difference in the language that is used in different Circuits about the sustainability of claims against resident defendants, this does not have a bearing on the present case. This is because Barr has already *conceded* that Samanta's causes of action against Harwer were properly pled (Barr Petition at 7), and it did *not* offer extrinsic evidence that cast doubt on whether she would be able to prove the necessary elements. Barr's *only* extrinsic evidence was the fact of nonservice — which, as shown above, does not suffice as the basis for removal.

(ii) Barr has not shown that any of the Circuits reject the use of extrinsic evidence to pierce the veil

Likewise, Barr fails in its attempt to characterize the Circuits as having drifted away from this Court's standard in *Wecker*. Significantly, Barr has not cited a single case that rejects the use of any type of extrinsic evidence to prove whether there is a sustainable cause of action. As pointed out earlier, the Ninth Circuit — whose decision in the present case Barr criticizes — *does* allow such evidence to be considered when (unlike in the present case) it is presented. *Ritchey v. Upjohn Drug Co.*, 139 F.3d at 1318. So this is not an instance of the Ninth Circuit — or any other Circuit — being out on a limb.

(iii) Barr has not shown that any of the Circuits have adopted its "intent test"

Nor has Barr managed to show that there is a Circuit split on whether there is an alternative "intent" test. Of the cases cited in its effort to identify a Circuit split, only one — *In re Briscoe*, 448 F.3d 201 (3rd Cir. 2006) — is identified by Barr as referring to "intent." However, that case was decided on grounds that had nothing to do with "intent." There, a district court found that claims in a class action against certain non-diverse defendants were time-barred. *Id.* at 206. That is a classic case of the mainstream test, with its focus on the cause of action.

The passing references in the Third Circuit's opinion in *Briscoe* to "intent" were, at most, dictum. *In re Briscoe*, 448 F.3d at 216-217. Moreover, one of them was followed immediately by the qualification: "But, if there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper

and remand the case to state court. . . ." *Id.* at 217, citation omitted. So the emphasis is placed squarely on the cause of action, as it should be.

In short, far from there being a Circuit split on the issue of "intent," there is no proper authority from *any* of the Circuits that the test advocated by Barr is the correct one.

F. The Jurisdictional Defect Was Not Cured By The Time The District Court Entered Judgment

Barr also argues that "even if [it] had removed the action prematurely," the fact that Harwer was not served before judgment was entered by the district court meant that any jurisdictional defect was cured. (Barr Petition at 23-25.) Barr relies in this part of its argument principally on *Caterpillar Inc. v. Lewis*, 519 U.S. 61.

As a preliminary observation, all that Barr is doing here is advancing its argument about why this unpublished case was wrongly decided. Barr makes no argument for granting review on this issue beyond the fact that it disputes the result in the appeal that it lost. That is not a compelling argument for granting its Petition. *Watt v. Alaska*, 451 U.S. 259, 275, fn.5 (1981) (Stevens, J., concurring) ("The possibility that a lower court may have incorrectly decided a federal question is, of course, a relevant factor when this Court decides whether to exercise its discretionary certiorari jurisdiction. However . . . our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases. . . .").

That said, Barr is anyway mistaken in its view of whether there was error. First, it is important to note that purportedly "sham" parties are not automatically eliminated from a suit after removal under the doctrine of fraudulent joinder. They

remain part of the action until or unless dismissed by the district court. *See, e.g., Farias v. Bexar County Bd. of Trustees*, 925 F.2d 866, 872 (5th Cir. 1991) (motion to dismiss properly brought against nonremoving defendants who remained parties).

Thus, when the case was removed, Harwer remained a party. Indeed, the case — once in federal court — continued to be captioned "Samanta v. Harwer, et al." (*See, e.g.*, App. 5a.) And there is nothing in the record that indicates that Harwer was ever dismissed by the district court. The jurisdictional defect that was present at the outset remained throughout. Under the holding of *Caterpillar*, if, at the end of the day and case, a jurisdictional defect relating to diversity remains uncured, the judgment *must* be vacated. *Caterpillar Inc. v. Lewis*, 519 U.S. at 76-77.

In *Caterpillar*, the Court found that the jurisdictional defect *was* cured under the facts of that case. *Caterpillar Inc. v. Lewis*, 519 U.S. at 73. However, those facts were very different from the ones in the present case. *Caterpillar* deals with a situation where a plaintiff — after removal — voluntarily and affirmatively released the remaining resident defendant from the lawsuit through settlement, thereby creating diversity. *Id.* at 65-66. Here, Samanta has never taken such an affirmative step — she has never resolved her differences with Harwer in the court system and there is nothing in the record indicating that she has done so elsewhere. Her papers filed with the California state court, the district court, the Ninth Circuit, and this Court indicate her wish to continue to litigate her claim against Harwer.

Samanta acknowledges that the holding in *Caterpillar* is not restricted to a situation in which a resident defendant is released though settlement. The Court held, more generally, that "a district court's error in failing to remand a case

improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Caterpillar Inc. v. Lewis*, 519 U.S. at 64. However, *Caterpillar* could only apply if there were a jurisdictional defect at the point of removal and something subsequently happened that cured it. The fact is that *nothing* did happen in this case. This is because Harwer was never dismissed as a party. Whatever her status was at the point of removal has remained the same ever since.

Moreover, there is nothing in *Caterpillar* that imposes on a plaintiff the obligation that Barr contends exists in order to preserve appellate rights. It is one thing to say that if a plaintiff releases the only resident defendant after removal, there is no longer a jurisdictional problem and the case should just move on. But it goes beyond *Caterpillar* to say that a plaintiff in Samanta's position must affirmatively litigate against the resident defendant in federal court in order to be able to appeal the fact that the case was in federal court at all — even though that same federal court has already declared the resident defendant to be a "sham."

In other words, it would be a confounding directive if, having been told that the case is being removed to federal court because the resident defendant is a "sham," the plaintiff is then told that she does not have grounds to appeal that decision because that same resident defendant has not been served with federal process.

As to why Harwer was not served with the state court summons once removal had taken place, the answer is surely obvious. The state court had lost jurisdiction of the case. Thus, its summons could not have had any force or effect from then on. For Samanta to have tried to pursue Harwer in state court at that point would have conceded the issue — it

would have meant treating the action against Harwer as separate from the one against Barr.

G. Dismissal Of The Resident Defendant By The Ninth Circuit Would Have Been Improper Because She Is Not A Dispensable Party

The fact that Harwer was not dismissed is much more than a "housekeeping issue," as Barr calls it. (Barr Petition at 27.) Barr argues that the Ninth Circuit should simply have dismissed Harwer as part of its appellate review. (*Id.*) It cites to *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). Actually, what the Court said in that case was that "a court of appeals *may* grant a motion to dismiss a *dispensable* party whose presence spoils statutory diversity jurisdiction." *Id.* at 827 (emphasis added).

First, the Court talked about "may," not "must." Second, this argument brings one back to the point about Samanta's claims against the two defendants not being separable. Harwer is not a "dispensable" party, because the claims against her and Barr are closely intertwined such that the state court complaint sought a joint judgment against both of them. Separating Harwer would mean that complete relief could not be granted as between the other parties and there would, moreover, be the risk of inconsistent obligations. (*See* Fed. R. Civ. P. 19.)

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

JOHN DERRICK
Counsel of Record
THE LAW OFFICE OF JOHN DERRICK
21 East Pedregosa Street
Santa Barbara, CA 93101
(805) 284-1660

Attorney for Respondent

(3)

No. 07-20

FILED
AUG 15 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BARR LABORATORIES, INC.,
Petitioner,

v.

MEERA SAMANTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF

JOSEPH P. THOMAS *
LINDA E. MAICHL
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
(513) 698-5000

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON D C 20002

BEST AVAILABLE COPY

CORPORATE DISCLOSURE STATEMENT

Petitioner Barr Laboratories, Inc.'s corporate disclosure statement was set forth at page (i) of the Petition for a Writ of Certiorari and there are no amendments to that statement.

TABLE OF CONTENTS

		Page
CORPORATE DISCLOSURE STATEMENT		i
TABLE OF AUTHORITIES		iv
INTRODUCTION		1
A.	This Case Is Not Procedurally Unusual	2
B.	Existing Law Does Not Provide a Solution	4
C.	Barr Is Not Advocating a Rule that Is Impractical or that Would Violate State Sovereignty	6
D.	The Ninth Circuit Ignored *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921) and *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996)	6
E.	Samanta's Discussion of *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907); and *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), Misrepresents Those Cases and Spotlights Undeveloped and Ambiguous Facets of the Fraudulent Joinder Doctrine	8
CONCLUSION		10

TABLE OF AUTHORITIES

CASES Page

Alabama G.S.R. Co. v. Thompson,
200 U.S. 206 (1906) 10

Caterpillar, Inc. v. Lewis,
519 U.S. 61 (1996) 6, 7

Grandy v. Crompton,
55 F. Supp. 2d 593 (S.D. Miss. 1999) 5

Hauck v. ConocoPhillips Co.,
2006 WL 1596826 (S.D. Ill. 2006) 4

Insinga v. LaBella,
845 F.2d 249 (11th Cir. 1988) 5

Mecom v. Fitzsimmons Drilling Co., Inc.,
284 U.S. 183 (1931) 8

Phillips Petroleum Co. v. AIG Tech. Servs., Inc.,
99 F. Supp. 2d 787 (S.D. Tex. 2000) 4

Pullman Co. v. Jenkins,
305 U.S. 534 (1939) 8, 10

Saucier v. Katz,
533 U.S. 194 (2001) 7

Tedford v. Warner-Lambert,
327 F.3d 423 (5th Cir. 2003) 5

Wecker v. Nat'l Enameling & Stamping Co.,
204 U.S. 176 (1907) 8, 9

Weems v. Louis Dreyfus Corp.,
80 F.2d 545 (5th Cir. 1967) 5

Wilson v. Republic Iron & Steel Co.,
257 U.S. 92 (1921) 6, 7, 8

STATUTES

28 U.S.C. § 1446 5

INTRODUCTION

Barr's petition seeks guidance on what constitutes a good faith joinder of a resident defendant: particularly, what standard will be employed in making the determination, how is the burden of establishing that the joinder is not in good faith satisfied, and what evidence may be considered in making the determination. In response, Samanta attempts to simplify the issues as involving only the fact of service or non-service of the resident defendant at the time of removal and the fact of dismissal or non-dismissal of the unserved resident defendant at the time of judgment. Those facts, however, merely highlight the importance of this Court's review of the legal issues presented.

That the resident defendant was never served in this case suggests that Samanta lacked any good faith intent to pursue claims against the resident defendant. As set forth more fully below, plaintiff's intent in pursuing claims against a resident defendant is precisely the question that Petitioner argues must and should be answered under the fraudulent joinder doctrine. That is especially true where, as here, a plaintiff remains steadfastly silent in response not only to evidence presented regarding her abject failure to serve the resident defendant, but also when the district court cites the evidence of non-service and plaintiff's subsequent silence in ruling that the resident defendant had been fraudulently joined.

Rather than address those critical legal issues in response, however, Samanta again chooses to be silent. Instead, Respondent suggests that this case is inappropriate for the granting of certiorari either because it is factually or procedurally inapposite or because a defendant could engage in self-help in lieu of clear guidance from this Court (i.e. ask the state court to dismiss the non-served defendant against whom the plaintiff had no intent of proceeding), or because a lower court itself might act in a way that obviates the need for clarity from this Court regarding fraudulent joinder (i.e., a

state court might at some point *sua sponte* dismiss a non-served defendant against whom a plaintiff has no intent of proceeding).

In making those arguments, Samanta ignores the teachings of *Wilson* and *Caterpillar* and urges this Court instead to accept the status quo in which certain jurisdictions, including the Ninth Circuit, are free to ignore facts clearly establishing plaintiff's lack of a good faith intent to pursue claims against a resident defendant when deciding whether that defendant has been fraudulently joined.

Barr submits that such a result will serve only to further perpetuate the confusion and ambiguity surrounding the fraudulent joinder doctrine for both courts and litigants alike. For the reasons set forth in Barr's Petition, as well as those set forth below, Barr respectfully requests that this Court grant its Petition for Writ of Certiorari.

A. This Case Is Not Procedurally Unusual

Samanta asserts this case developed due her "misunderstanding" about whether the resident defendant had been served and the district court's purported "misunderstanding" about whether a state court summons had been issued for the resident defendant.

That argument might have had merit but for the simple fact that Samanta had not one, not two, but at least four opportunities to correct any "misunderstandings" and advise the district court of her "belief" that the resident defendant had been served. She did not. She remained silent when evidence to the contrary was brought to her attention in Barr's notice of removal, when the district court issued its show cause order, when Barr responded to that order, and when the district court vacated the show cause order. Not until months later did Samanta contend that the attorney who assisted in filing the suit told her that the resident defendant had been served—and still, she provided no evidence to support her contention and the resident defendant remained unserved.

Samanta's argument begs the question—at what point must the purported "misunderstandings" be seen as more—as Samanta's lack of a good faith intent to pursue claims against the resident defendant?

Similarly, even if it were true—which it is not[1]—that the district court retained jurisdiction based on its purported "misunderstanding" that a state court summons had not issued for the resident defendant, Samanta could have corrected that "misunderstanding." Again, she remained silent.

At bottom, Samanta's alleged "misunderstandings" go to the heart of the issues presented to this Court regarding the evidence a court should consider in determining whether a resident defendant is joined in good faith. May the plaintiff remain silent in the face of evidence showing the plaintiff does not have a good faith intent to pursue her claims? This Court's early precedent indicates the response is "No." Yet, the Ninth Circuit's order indicates the response is "Yes."

Must the plaintiff present evidence to contravene the evidence presented by the non-resident defendant? This Court's early precedent indicates the response is "Yes"—a plaintiff's failure to offer evidence contravening the evidence provided by the defendant constitutes acquiescence. Early precedent also instructs evidence outside the pleadings should be considered. The Ninth Circuit's order indicates the response is "No."

The importance of the issues is magnified when one considers that the information to show whether or not there is a

---

[1] The district court's order stated Barr had provided information that Samanta had "never served" Harwer "nor requested a summons for service from the state court or this Court." (App. 10a.) Only one fact was incorrect. A summons had issued from the state court, but the resident defendant had not been served and Samanta never sought a summons from the district court. There is no indication the court retained jurisdiction based on the single "misunderstanding" as to whether a state court summons had been issued.

good faith intent to pursue a claim frequently is solely within the plaintiff's possession. As between Barr and Samanta, only Samanta knew her "understanding" regarding whether the resident defendant had been served.[2] When she failed to advise the district court of her "understanding" in the face of contrary evidence, she acquiesced to those facts. Yet, federal courts do not consistently require plaintiffs to come forward with evidence to refute facts advanced by the removing defendant. *See Hauck v. ConocoPhillips Co.*, 2006 WL 1596826 at *4, n.4 (S.D. Ill. 2006) (noting removing defendant's submission of evidence to support fraudulent joinder claim does not impose burden on plaintiff to submit evidence to disprove fraudulent joinder); *Phillips Petroleum Co. v. AIG Tech. Servs., Inc.*, 99 F. Supp. 2d 787, 791 (S.D. Tex. 2000) (noting plaintiff could submit evidence to rebut removing defendant's allegation of fraudulent joinder, but is not required to do so).

The facts of this case are neither unusual nor unlikely to occur again. Clarifying the burden of proof and what evidence may be considered would assist courts in applying the fraudulent joinder doctrine to determine if a plaintiff has a good faith intent to pursue claims against a resident defendant.

B. Existing Law Does Not Provide a Solution

Samanta postulates a "simple solution" exists—ask the state court to dismiss the resident defendant or wait until the state court *sua sponte* dismisses that defendant. Whether a state court will dismiss the resident defendant "at an early stage" is speculation. Furthermore, that solution raises two

---

[2] Samanta had other information she never shared with the district court and which Barr did not learn until after the Ninth Circuit entered its order. The same day Samanta filed her complaint, she sent Harwer, the resident defendant, a letter demanding binding arbitration pursuant to the terms of a physician/patient agreement between Harwer and Samanta. Those agreements are valid under California law and provide that the parties are giving up their constitutional rights to have disputes decided by a court of law. Samanta then participated in the arbitration proceeding with Harwer, ultimately abandoning it.

other impediments to removal—the voluntary-involuntary rule and the one-year time limit in 28 U.S.C. § 1446, both of which provide opportunities for the plaintiff to name a resident defendant without a good faith intent to pursue the claims.

The "voluntary-involuntary rule" bars removal after a resident defendant is dismissed where the dismissal is not the voluntary act of the plaintiff. *See, e.g., Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 546 (5th Cir. 1967) (noting under voluntary-involuntary rule if resident defendant's dismissal results from defendant or court acting against plaintiff's wishes, case is not removable).[3] In addition, the one-year time limit in § 1446 precludes removal if the resident defendant is not dismissed within one year of the action's commencement. *But see Tedford v. Warner-Lambert*, 327 F.3d 423, 428-29 (5th Cir. 2003) (permitting tolling of one-year time limit where plaintiff's conduct in preventing removal inequitable).

As a result, if the diverse defendant requests dismissal or awaits dismissal of the defendant by the court, the voluntary-involuntary rule may preclude removal. If an exception exists to the rule, but the dismissal occurs more than a year after the action was commenced, the one-year limit may preclude removal (unless the action is in the Fifth Circuit and then only if the plaintiff's conduct is considered to be inequitable so the "equitable exception" applies). In either case, the plaintiff never had a good faith intent to pursue the claim against the resident defendant. Yet, the defendant has no mechanism to exercise its right to federal jurisdiction without the ability to invoke the fraudulent joinder doctrine.

---

[3] Some circuits apply exceptions to the voluntary-involuntary rule, others do not. *See Insinga v. LaBella*, 845 F.2d 249, 254 (11th Cir. 1988) (permitting removal after resident defendant dismissed on sovereign immunity grounds); *Grandy v. Crompton*, 55 F. Supp. 2d 593, 596 (S.D. Miss. 1999) (noting Fifth Circuit has not followed Eleventh Circuit's approach in *Insinga*).

C. Barr Is Not Advocating a Rule that Is Impractical or that Would Violate State Sovereignty

Barr does not seek guidance that is either impractical or violative of state sovereignty. A state court is not "better placed" to determine a plaintiff's intent in pursuing a claim against a resident defendant. A state court will have no more information available than does a federal court if the plaintiff remains silent. If "perfectly acceptable reasons" exist as to why a defendant has not been served, the plaintiff merely needs to present them.

Furthermore, Samanta's argument that "[i]f what took place in the present case at the trial court level were found to be a proper method of establishing diversity jurisdiction based on removal, a rule of law would be created that any non-resident defendant, unhappy at the pace of proceedings in state court against a resident defendant, could file a notice of removal and, in essence, ask the district court to second-guess whether the state court had acted sufficiently quickly to dismiss unserved defendants" suffers from the same flaws discussed above.

In addition, the argument implies the case was removed based on the "pace of proceedings." However, the case was removed due to Samanta's failure to timely serve the resident defendant. Upon learning that fact, Barr had two choices: remove the case within the thirty days provided in the statute, or risk an untimely removal. If Samanta's failure to serve the resident defendant was not due to her lack of good faith intent to pursue claims against that defendant, she needed only to advise the district court. She did not.

D. The Ninth Circuit Ignored *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921) and *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996)

In *Wilson*, this Court held that if the plaintiff does not take issue with or object to the statements made in the removal

petition, the plaintiff "must be taken as assenting to its truth and the petitioning defendant need not produce any proof to sustain it." *Id.* at 97-98. Barr provided evidence to show the resident defendant had not been served within the time allowed under state service rules. Samanta remained silent. The Ninth Circuit ignored those facts. Doing so was in direct contradiction to this Court's decision in *Wilson.*

Moreover, Barr is not merely disputing that this case was wrongly decided. Rather, Barr submits that in vacating the district court's judgment, the Ninth Circuit's decision conflicts with this Court's prior decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996).

Samanta's arguments as to why the Ninth Circuit was correct in ignoring *Caterpillar* are misplaced. "Sham" defendants may not be "automatically eliminated from a suit after removal under the doctrine of fraudulent joinder," but an unserved defendant never becomes a party to an action and a court never obtains jurisdiction over that party. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 212 n.1 (2001) (Ginsburg, J., dissenting) (stating: "Though named as a defendant, Parker was never served with the complaint, and therefore did not become a party to this litigation.").

Samanta further argues that *Caterpillar* is distinguishable because she "never [took] [] an affirmative step—she has never resolved her differences with Harwer in the court system and there is nothing in the record indicating that she has done so elsewhere." It is precisely that absence of good faith intent around which this matter turns. Samanta's failure to serve Harwer was a voluntary action—because Samanta chose not to serve Harwer, Harwer never became a defendant. Therefore, as in *Caterpillar*, due to Samanta's voluntary action, complete diversity existed at the time of final judgment in favor of Barr. Moreover, there is "nothing in the record" because Samanta ignored not less than four separate

opportunities to submit evidence for the record that would manifest her intent.[4]

E. Samanta's Discussion of *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907); and *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), Misrepresents Those Cases and Spotlights Undeveloped and Ambiguous Facets of the Fraudulent Joinder Doctrine

Samanta discusses *Wilson*, *Wecker*, and *Pullman* to support an argument that this Court's prior holdings do not require a decision different from that reached by the Ninth Circuit. However, her discussion misrepresents those cases, and lends focus to the existing confusion and ambiguity regarding removal and fraudulent joinder.

Arguing Barr's reliance on *Wilson* is misplaced, Samanta contends the actions against Barr and Harwer were not separable. That argument ignores the point that under *Wilson* a plaintiff may not remain silent when evidence of fraudulent joinder is presented.

Samanta quotes *Mecom v. Fitzsimmons Drilling Co., Inc.*, 284 U.S. 183 (1931), for the principle that "in removal proceedings the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined." From that quote, Samanta argues the emphasis is not "what is going on in the mind of the plaintiff, but on the cause of action asserted against the resident defendant." Samanta's formulation omits part of the equation and confuses "motive" versus "intent." The plaintiff's motive for

---

[4] Samanta further argues that she did not have a duty to litigate against Harwer once the action was removed. Yet the action was removed due to Samanta's failure to timely serve Harwer. At a minimum, Samanta had a duty to respond once the district court invited her to present evidence of good faith joinder in its order retaining jurisdiction. Her failure to do so should be considered when deciding whether joinder of the resident defendant was fraudulent.

filing in state court or including a resident defendant may not be relevant. But, as evidenced by this Court's decision in *Wecker*, the plaintiff's intent to pursue the claim against the resident defendant is relevant and determination of whether or not that intent exists is not limited to the pleadings.

Samanta admits that courts may pierce the pleadings to decide fraudulent joinder issues but asserts piercing is limited and the "focus is kept on the cause of action, not on the intent of the plaintiff." That assertion reflects a basic misunderstanding—one shared by courts and litigants alike—of what was considered in *Wecker* and this Court's holding. In *Wecker*, this Court stated:

> In view of this testimony and the apparent want of basis for the allegations of the petition as to [the resident defendant's] relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for the *purpose* of defeating the right of the corporation to remove the case to the Federal court.

Wecker, 204 U.S. at 185 (emphasis added). The definition of "purpose" is "intention." Evidence outside the pleadings was considered, as was the fact the plaintiff did not present evidence to contradict that presented by the defendant. The plaintiff's "subjective intent" also was considered.

> While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices *intended* to prevent a removal to a Federal Court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

Id. at 185-86 (emphasis added). As established by this Court, then, the doctrine of fraudulent joinder does include the "subjective intent" of the plaintiff.

Finally, *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), does not address whether the fact of non-service precludes removal if the time for service under the state's civil rule has expired or whether a plaintiff's failure to timely serve a non-resident defendant is evidence of a plaintiff's lack of a good faith intent to pursue the claim against that defendant. The statement in *Pullman* that "a non-resident defendant should not be permitted to seize an opportunity to remove the cause before service upon the resident co-defendant is effected," is qualified by the statement that "[i]t is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove." *Id.* Those statements, together with *Wecker's* ruling that the plaintiff's subjective intent is relevant, leave open the question of whether the plaintiff's failure to timely serve evinces lack of a good faith intent to pursue the claims.

That question in turn leads back to the very issues Barr requests this Court to address: what standard will be employed in making the determination, how is the burden of establishing that the joinder of a resident defendant is not in good faith satisfied, and what evidence may be considered in making the determination.

CONCLUSION

Congress provided defendants the right to seek federal jurisdiction and this Court recognized over a century ago that "[f]ederal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals." *Alabama G.S.R. Co. v. Thompson*, 200 U.S. 206, 218 (1906). The guidance Barr seeks through its petition would assist the federal courts in construing the removal statute and the fraudulent joinder doctrine.

For the foregoing reasons and those stated in Barr's Petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

JOSEPH P. THOMAS *
LINDA E. MAICHL
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
(513) 698-5000

* Counsel of Record

Attorneys for Petitioner